Original

Nos. 8587 and 8588.

IN THE

SUPREME COURT

OF THE

STATE OF CALIFORNIA.

CHARLES LUX et al.,

Appellants,

vs.

JAMES B. HAGGIN et al.,

Respondents.

APPELLANTS' POINTS AND AUTHORITIES.

STETSON & HOUGHTON,
Attorneys for Appellants.

Filed August 31st 1883.

J. W. McCourtney Clerk,

By D. Williams Deputy.

In the Supreme Court

OF THE

STATE OF CALIFORNIA.

CHARLES LUX AND AL., *Appellants,*

vs.

JAMES B. HAGGIN AND AL. *Respondents.*

Points and Authorities for Appellants.

STATEMENT OF FACTS.

This is an action brought by the plaintiffs, Henry Miller, Charles Lux and James C. Crocker, who own a large tract of land along Buena Vista Slough, a water course or channel which, they claim, is a part or continuation of Kern River, and against the defendant, Kern River Land and Canal Company, to restrain the said defendant from diverting and appropriating the waters of Kern River from their natural channel.

The plaintiffs claim that as they own the land along

and upon the border of Buena Vista Slough that, as riparian owners, they are entitled to have the waters of Kern River flow uninterruptedly by, to and through their lands, and which they claim the defendant has for years diverted and appropriated, to the injury of the plaintiffs.

The defendant sets up as a defence to this action:

1st. That by virtue of certain proceedings taken by it or its grantors, under the provisions of the Civil Code of California relating to water rights, it is entitled to take and appropriate a portion of the water running in Kern River. (Answer, Vol. 1, fol. 210 to 230).

2d. That the plaintiffs are not injured by any appropriation of said water of Kern River by defendant, for the reason that if it did not appropriate such water, numerous other canal companies who take water from Kern River through canals lower down the river than the defendant, would take the water anyway; and, therefore, if defendant should let it pass the headgate of its canal, it would never reach the lands of the plaintiff. (Answer, Vol. 1, fol. 230 to 238).

3d. That the defendant takes or appropriates the water from Kern River "with the knowledge, permission and consent, license and approval" of other canal companies who take water from Kern River, and have the right to and are entitled to take such water. (4th Answer, Vol. 1, fol. 239 to 248).

The defendant also claims that Buena Vista Slough, upon which the lands of plaintiffs are situated, is not a part of, or a continuation of Kern River.

The defendant claims also that Buena Vista Slough, is not a natural water course or channel.

The defendant also pleads the Statute of Limitations.

The defendant claims also, that by virtue of a compliance, by itself and its grantors with certain general

and local customs in relation to the appropriation, diversion and use of water, as well as certain Acts of Congress of the United States, and Acts of the Legislature of the State of California, defendant has appropriated, acquired and become entitled to a large portion of the water flowing in Kern River. (2d Ans., Vol. 1, fol. 206–210.)

The case was tried before the Court without a jury.

POINTS AND AUTHORITIES.

The first error complained of, is the order of the Court refusing to strike out certain portions of the answer of the defendant, and the decision of this Court upon that ruling will necessarily dispose of many of the rulings of the lower Court, made during the progress of the trial, as the plaintiffs at the trial objected to the introduction of evidence offered by the defendant in support of the defences which plaintiffs had moved to strike out, and plaintiffs' objections were overruled, and to the rulings of the Court they excepted, and such rulings are assigned as error on this appeal.

The defendant, in its "Second Answer" (Trans., Vol. 1, fol. 208–9–10), sets up as a defence the following:

"Defendant alleges, on its information and belief, "that by virtue of a compliance by itself, its prede- "cessors in interest and grantors, with the general and "local customs well established and recognized as part "and portion of the common law of the United States, "and of this State, in the matter of and relative to the "appropriation, diversion and use of water and acqui- "sition of water rights within the State of California, "as well as with the statute laws of the United States, "and of the State of California, on such subject made

"and provided, defendant has appropriated, acquired "and become entitled to, and now is entitled to, and "of right may take out, appropriate, divert, use and "consume a large part or portion, to wit: seventy- "four thousand (74,000) inches, measured under a "four-inch pressure of the flowing waters of said "Kern River."

Plaintiffs moved to strike out the above allegation or defence, on the ground that it was sham, irrelevant and redundant. The motion was denied, and plaintiff took an exception. (Trans., Vol. 1, fols. 276–7–8.)

This ruling was clearly error. The plaintiffs were suing as the owners of certain swamp and overflowed lands, the title to which passed to the State of California in 1850 (79th finding, Vol. 1, fol. 463), and seeking as riparian owners an injunction to prevent the defendant from diverting from Kern River, waters that would, if permitted to run down the river, flow through plaintiffs' lands.

The Act of Congress relied upon was passed in 1866, and amended in 1870.

No Act of Congress could affect lands belonging to the State of California, or its grantors, when such Act was passed.

The only Act passed by the Legislature of the State of California, relating to appropriation of water, provided that proceedings under it should in no manner affect the rights of riparian owners.

As a plea of general and local custom it is clearly insufficient.

See Cases p. 429

The "Third Answer," of defendant (Trans., Vol 1, fols. 212 to 216), sets up as a defence, the following:

"That heretofore, to wit: on or about the 4th day "of May, A.D. 1875. defendant's grantors, acting in the "full faith and *bona fide* belief that a large portion, to "wit: more than 74 thousand (74,000) inches, meas- "ured under a four-inch pressure, of the waters of "said Kern River, were unused, vacant, unappropri- "ated and free and open to appropriation and use, "posted a certain notice of appropriation of water on "the north bank of said river, in Kern County, State "of California, at a point on or about the southwest "quarter of Section Thirteen (13), in Township Twen- "ty-nine (29) south, Range Twenty-seven (27) east, "Mount Diablo base and meridian, according to the "United States Surveys, wherein they claimed and "whereby they notified plaintiffs, plaintiffs' grantors, "and all persons whomsoever it might concern, that "they claimed and appropriated and proposed and "intended to take out and divert, use and consume a "large part and portion, to wit: seventy-four thousand "(74,000) inches, measured under a four-inch pres- "sure, of the flowing waters of said Kern River, for "the purpose of irrigating certain lands in said notice "described, and of supplying water thereunto and "thereon for other purposes in said notice set forth; "That within ten days after the posting of said notice, "to wit: on the 4th day of May, A.D. 1875, the said "notice was duly recorded in the office of the County "Recorder of said Kern County, in Book 1 of Water "Rights, page 37, to which said record reference is "here made, and which said record is made a part "hereof; That defendants' said grantors thereby ap- "propriated and acquired the said amount of the flow- "ing waters of said Kern River, with the right to take "out, divert, use and consume the same for the uses

" and purposes in said notice mentioned, all of which " said appropriations, rights and properties they (de- " fendants' said grantors) on, to wit: the 18th day of " May, A.D. 1875, granted, bargained and sold, trans- " ferred, assigned and conveyed to this defendant; " That within twenty days after the posting of said " notice, as aforesaid, to wit: on or about the day " of May, A.D. 1875, defendant for the purpose of " utilizing said waters of Kern River, in the manner " and at the places in said notice mentioned, com- " menced the construction of that certain ditch or " canal known as the Calloway Canal, and being the " same as in said complaint described, and thereafter " and thenceforth, defendant continuously and diligent- " ly prosecuted the work on said canal until the same " was completed, and expended thereon and in the " construction thereof, large and vast sums of money, " amounting in the aggregate to, to wit: ninety thous- " and ($90,000) dollars: That during the construction " of said canal, defendant diverted and used the afore- " said amount of water in irrigating and fertilizing " the lands in said notice described, and for stock and " other beneficial purposes on said described lands, " and defendant has continued so to use said amount " of water through said canal from and after the com- " pletion thereof.

Plaintiff moved to strike out such answer as sham, irrelevant and redundant. The motion was denied and plaintiffs took an exception. (Trans., Vol. 1, folio 280 to 285.)

The defence is clearly open to all the objections made to it by the plaintiffs, and should have been struck out. It was an attempt on the part of the defendant to justify its appropriation of the water of Kern River, under an appropriation made under the provisions of the Civil Code. By the provisions of

the very Act under which their appropriation was claimed to be made, the rights of all riparian owners were saved, and declared not to be in any manner affected.

Civ. Code, § 1422.

It is true that a compliance with the provisions of the C.C., relating to water rights causes the right to relate back to the date of posting the notice.

Sec. 1418, C. C.

But this only applies as between appropriators.

Sec. 1414, C. C.

Another defence made in the "Third Answer" was in words and figures following (Trans. Vol. 1, fol. 216 to 230):

"That for more than ten years prior to and next "preceding the posting of said notice, and the appro- "priation and claim of said waters by defendants' said "grantors, all and every part of those certain lands in "said complaint described were lying entirely waste, "uncultivated and unoccupied, and no water whatso- "ever from the said Kern River was used thereon for "any useful or beneficial purpose, or for any purpose "whatsoever; and defendants' said grantors and de- "fendant, knowing said facts, verily believed that no "water whatsoever was claimed for or on said lands "or any part thereof, by plaintiffs or any of them, or "by plaintiffs' grantor or grantors, or by the grantor "or grantors of any of the plaintiffs, or by any person "or persons whatsoever; that neither defendant nor "defendant's said grantors, or any of them, knew or "had any means of knowing, that plaintiffs or any of "them, or the grantor or grantors of plaintiffs or of any "of them, had or claimed any rights whatsoever in or "to the waters of said Kern River, or any part thereof;

" that divers and various other parties, strangers to
" this suit, seeing and knowing that this defendant
" was constructing the said canal, and had diverted
" and appropriated, and was diverting and appropriat-
" ing the said waters of Kern River, for the purpose of
" supplying and distributing the same to the lands in
" said notice described, and seeing and knowing that,
" from time immemorial, no water from said river had
" been used, and that none was being used, upon the
" lands or any part thereof in said complaint described,
" and verily believing that neither plaintiffs, nor any
" of them, nor plaintiffs' grantor or grantors, nor the
" grantor or grantors of any of the plaintiffs, claimed
" or asserted any rights whatsoever to the waters of
" said river or any part thereof, or contemplated or
" proposed using said waters or any part thereof, and
" verily believing that this defendant had acquired
" and possessed a valid and vested right to the said
" amount of the flowing waters of said Kern River;
" and abiding in the faith and belief that the lands and
" every part thereof in said notice described would
" ever be supplied with water from said Kern
" River, for irrigating and other purposes, by this
" defendant, through its said canal, [which said
" faith and belief were induced and confirmed
" by the silence of plaintiffs, and each of them,
" and of plaintiffs' grantor and grantors, and the
" grantor and grantors of each of the plaintiffs, in
" making any demand for, or asserting any claim to,
" the said waters of Kern River, or any part thereof,]
" entered upon and purchased from the Government
" of the United States, and from other parties, large
" and vast tracts of land bordering upon, or along the
" course of said Calloway Canal, [and being within
" and forming a part of that larger tract of land in said
" notice described, knowing that with the certainty of
" having and receiving water thereon from said canal,

" for irrigating, stock and domestic purposes, the
" same were, and ever would be, of great and con-
" stantly increasing value,] and expended therefor and
" thereon, in improving the same, large sums of
" money, amounting in the aggregate to, to wit: more
" than two millions of dollars, none of which said
" lands would they have purchased, and none of said
" sums of money would they have expended, were it
" not for their said knowledge, faith and belief above
" set forth, they well knowing that all of said lands in
" said notice described were, and ever would be,
" utterly and absolutely worthless, if deprived of the
" water from said Kern River through said canal; that
" said third parties so believing that this defend-
" ant had, and would ever have the right to appropri-
" ate and divert, through its said canal, the aforesaid
" amount of water from said Kern River, and that
" their, and each of their said tracts of land so pur-
" chased and improved would ever be, and have the
" right to be supplied by this defendant through its
" said canal with water from said Kern River, for irri-
" gation and for other purposes, made and entered
" into certain and sundry contracts with this defend-
" ant, whereby this defendant bound and obligated
" itself to furnish and supply to the said parties upon
" their said several tracts of land, water for irrigating
" the same, and for stock and domestic purposes; that
" defendant would not have made nor entered into
" said contracts, or any of them, were it not for its
" reliance, faith and belief, based upon the facts here-
" inbefore recited, that it had the right to take out,
" appropriate, divert, use and consume for the pur-
" poses in said notices specified, the aforesaid amount
" of the flowing waters of said Kern River; that
" plaintiffs and each of them, and plaintiffs' grantors
" and each of them, well knowing the facts herein
" alleged, and also knowing that defendant was, in the

" construction of said canal, entering upon and under-
" taking a vast and extensive work, which would neces-
" sitate large and constant outlays and expenditures of
" money, and knowing, further, that defendant was
" actually expending in the construction of said canal
" large and vast sums of money, and that during the
" construction of said canal defendant was taking out
" and diverting, and when the said canal should be
" completed defendant would continue to take out and
" divert through the same a large portion, to wit: the
" amount hereinabove stated, of the flowing waters of
" the said Kern River, and also knowing when the
" said canal was completed that defendant did take out
" and divert, appropriate, use and consume, and from
" the time of its completion to the commencement of
" this action continue to take out and divert, appro-
" priate, use and consume through the said canal the
" aforesaid amount of the flowing waters of said Kern
" River, and further, knowing that defendant and de-
" fendant's grantors were, each and all of them, igno-
" rant that plaintiffs, or any of them, or plaintiffs'
" grantor or grantors, or any of them, or the grantor
" or grantors of any of the plaintiffs, had or claimed
" any right whatsoever in or to the waters of said Kern
" River, or any part thereof, and further knowing that
" defendant would not have undertaken the con-
" struction of said canal, nor have purchased the
" same, nor have expended said or any sums of
" money thereon, nor have made or entered into
" the aforesaid contracts, or any of them, were it
" not for the reliance and belief which defendant had
" that defendant was lawfully entitled to the said
" amount of the flowing waters of said Kern River,
" with the right to take out, divert, appropriate, use and
" consume the same through the said canal; yet, and
" notwithstanding, plaintiffs, and each of them, and
" each of their grantors, and each of the grantors of

" any of the plaintiffs, stood by and saw, acquiesced in,
" consented to, and impliedly approved, the appro-
" priation of said waters by defendant and defendant's
" grantors, and the work that was done, and was being
" done by defendant in the matter of the construction
" of said canal, and the preparations defendant was
" making for, and with the well-known and avowed
" intention of diverting, appropriating, using, and
" consuming the waters of said river to the amount
" above mentioned, but made no objection or oppo-
" sition to the same, nor did they or any of them notify
" or intimate to defendant, or to defendant's gran-
" tors, that they or any of them had or claimed any
" right whatsoever, in or to the waters of said Kern
" River, or any part thereof; and by their acts, their
" silence and their failure to assert or make known any
" rights which they, or any of them had, in or to the
" said waters or any part thereof, plaintiffs and their
" grantors encouraged and confirmed defendant in its
" belief that they neither had nor claimed, and that
" none of them had or claimed any interest in or
" right to the waters of Kern River, or any part
" thereof; and plaintiffs, and each of them are now
" estopped and precluded from asserting any rights
" which they or any of them have or may have in or to
" the waters of said Kern River, or any part thereof,
" adverse to this defendant; that if plaintiffs or any of
" them, after having tacitly approved and consented
" to the said acts of defendant and defendants' said
" grantors hereinabove recited, be now permitted to
" assert or maintain any right, claim, or interest what-
" soever in to the waters of said Kern River as against
" this defendant, the aforesaid acts and conduct of
" plaintiffs will be a fraud upon the rights of this de-
" fendant, and defendant will be thereby greatly and
" irreparably injured."

This defence plaintiffs also moved to strike out on the same grounds, the ruling and the exception were the same. This we say was error. The defence goes upon the theory that a riparian owner must make some use of the water running through his land. Such is not the law.

It could in no manner aid the defendant, that persons not parties to this suit had purchased land from the Government of the United States, relying upon the failure of plaintiffs to assert a claim to water running through their land, title to which they had acquired from the State of California. Nor could the fact that such purchasers from the United States had, or had not expended large sums of money on such lands in any manner affect the rights of plaintiffs, or of defendant in this case. Such third parties are not complaining of plaintiff's action, nor are they in this suit claiming protection through the defendant.

The facts pleaded are not sufficient, if intended as a plea by way of estoppel. A riparian owner cannot be deprived of his right in the water of a stream that runs through his land, simply by remaining silent when he sees a person constructing a canal to take water from such stream above his land.

Our Reports are full of cases that state what facts must be pleaded and proved to create an estoppel. We need only to refer to a few of the leading cases.

Biddle Boggs v. *Merced M. Co.*, 14 Cal., 279;
Davis v. *Davis*, 26 Cal., 23.

It is not alledged that the plaintiffs have done anything with the express intention to deceive the defendant.

It is not alleged that the defendant was destitute of all knowledge of plaintiff's title and of the means of acquiring such knowledge.

It is not alleged that defendant relied directly on the silence or conduct of plaintiffs.

This attempted plea of estoppel is remarkable in two particulars: for its length and its confused statement of facts.

The plaintiffs moved to strike out the following portion of the answer of defendant:

"Defendant denies,

"1st. That it has wrongfully taken out or diverted, "appropriated, used or consumed a part or any of the "waters of the Kern River, in said complaint men- "tioned;

"2d. That it has in any manner injured plaintiffs, "or any of them, or the lands or any part thereof, in "said complaint described," on the ground that it was redundant. It was error to deny such motion.

The whole denial was but a conclusion of law.

repeated?

The above "denials" were reported in the answer no less than five times (Vol. 1, fol. 207; also fol. 211; also fol. 231; also fol. 239; also fol. 249) and the same ruling was made on plaintiffs' motion to strike out the repeated denials.

Buckeye v Cowan, 5 Dess. Cas, 1866-7 p 226

The Court denied plaintiff's motion to strike out as sham, irrelevant and redundant, the following portion of said answer, to wit:

"On its information and belief, defendant alleges:

"That at various points on said river (all above the "lands and every part thereof in said complaint de- "cribed) heading thereon and leading therefrom, are "several large canals, owned by various and diverse "parties, strangers to this suit; that amongst said "canals and canal owners are the following, to wit:

" the Beardsley Canal, owned by the Kern River Water
" and Irrigating Company; the Kern Island Irrigating
" Canal, owned by the Kern Island Irrigating Canal
" Company; the Farmers' Canal, owned by the Farm-
" ers' Canal Company; the Stine Canal, owned by the
" Stine Canal Company; the Anderson Canal, owned
" by the Anderson Canal Company; the Gates Canal,
" owned by the Gates Canal Company; the Buena
" Vista Canal, owned by the Buena Vista Canal Com-
" pany; the James Canal, owned by the James Canal
" Company; the Plunkett Canal, owned by the Plunkett
" Canal Company; the Meacham Canal, owned by the
" Meacham Irrigation Canal Company; the Goose
" Lake Canal, owned by the Goose Lake Canal Com-
" pany; the Pioneer Canal, owned by the Pioneer Ca-
" nal Company; the James and Dixon Canal, owned
" by the James and Dixon Canal Company; the Joyce
" Canal, owned by the Joyce Canal Company; the
" South Fork or Panama Canal, owned by the South
" Fork Canal Company, and the Johnson Canal, owned
" by the Johnson Canal Company; that all of said
" above-named canal companies, except the South Fork
" Canal Company, and the Johnson Canal Com-
" pany, are corporations duly organized and existing
" under and by virtue of the laws of the State of
" California; that more than five years next pre-
" ceding the several times when, as in said complaint
" alleged, defendant did divert or take out water from
" said river, and more than five years next preceding
" the commencement of this action, said canal owners
" had, by virtue of a compliance by themselves, their
" respective predecessors, in interest and grantors,
" with the general local customs and usages, laws and
" regulations (as well those of the United States as
" those of the State of California), in the matter of
" and relative to the appropriation, diversion, use and
" consumption of water and the acquisition of water

" rights within this State, acquired the right to take
" out, divert, appropriate, use and consume for irriga-
" tion and other beneficial uses, each through its said
" and respective canal, a large part and portion of the
" flowing waters of said river; That at, and for more
" than five years next preceding, all the said several
" times when, as in said complaint alleged, defendant
" took out or diverted water from said river, and at
" and for more than five years next preceding the com-
" mencement of this action, said canal owners, under
" claim of right, did and now do openly, notoriously,
" continuously, exclusively and adversely to plaintiffs,
" and to all the world, take out and divert, appropri-
" ate, use and consume for irrigation and other bene-
" ficial uses, each through its said and respective
" canal, a large portion of the flowing waters of said
" river, so by it respectively acquired, ever and at all
" said times having and claiming the right so to do by
" virtue of the compliance with the general and local
" customs, usages, laws and regulations aforesaid;
" that the waters so taken out and diverted by said ca-
" nal owners are, and ever have been used and consum-
" ed in irrigation and other beneficial uses, and never
" again returned to the channel of said river; That
" after supplying to the said canals the said amounts
" of flowing water to which said canal owners are and
" during all the times herein mentioned have been en-
" titled and accustomed to have and receive, and of
" right ought to have and receive from said river, there
" is not, and except in times of sudden floods and
" freshets, never has been sufficient water left or re-
" maining in said river to, in its natural flow, flow down
" to, or reach the lands or any part thereof in said com-
" plaint described; That of the surplus waters of said
" river over and above the said amounts to which, as
" aforesaid, the said canal owners are, and during all
" the times herein mentioned have been entitled and

" accustomed to receive from said river in said canals
" the amount by defendant taken out or diverted is not,
" and never has been sufficient to, if left to itself, in
" its natural flow, flow down to, or reach the lands, or
" any part thereof, in said complaint described."

To which ruling of the Court the plaintiffs then and there duly excepted.

For this error alone, the judgment of the lower Court in this case must be reversed.

So far as this case was concerned, and as between the three plaintiffs, Miller, Lux and Crocker and the single defendant, The Kern River Land and Canal Company, it made no difference what other canal companies were taking water from Kern River. The rights of such companies could not be litigated in this case.

This action was commenced May 12, 1879, and before the case of *Keyes* v. *Little York Gold Washing and Water Company* was decided by this Court, (53 Cal., 724.)

The Court in that case having decided that several parties on a stream could not be united as defendants in an action to restrain them from committing a nuisance, the wrong complained of not being joint, this action was dismissed as to all the defendants except one. The plaintiffs were desirous of settling the qsestion of their right to have the waters of Kern River run in its accustomed channel, and through their land, and as against every one taking water from the river, and therefore made parties defendants the canal companies enumerated in that portion of the answer we asked to have struck out.

A demurrer being interposed to the complaint, and this Court having decided that we could not unite all the parties as defendants, we amended the complaint by dropping out all such defendants.

If we are not permitted to make the other canal companies defendants, and thus having them in the case as parties, and have plaintiffs' rights and theirs settled in this case, the defendant cannot, in an action in which they are not defendants, either defeat our action by showing that they too are trespassers, nor claim anything by reason of their rights to the water of Kern River, if they have any such right. If a demurrer to a complaint making such parties defendants would be held good, it must follow that a motion to strike out from an answer of a defendant in no manner connected with such parties, a defence setting up the rights of such parties must prevail.

The Court denied plaintiffs' motion to strike out as sham, irrelevant and redundant the following portion of said answer, to wit:

" On its information and belief defendant alleges:

" That at various points on said river (all above the " lands and every part thereof in said complaint de- " scribed), heading thereon and leading therefrom, " are several large canals, owned by various and di- " verse parties, strangers to this suit; That amongst " said canals and canal owners are the following, to " wit: the Beardsley Canal, owned by the Kern River " Water and Irrigating Company; the Kern Island " Irrigating Canal, owned by the Kern Island Irrigat- " ing Canal Company; the Farmers' Canal, owned by " the Farmers' Canal Company; the Stine Canal, " owned by the Stine Canal Company; the An- " derson Canal, owned by the Anderson Canal " Company; the Gates Canal, owned by the Gates " Canal Company; the Buena Vista Canal, owned " by the Buena Vista Canal Company; the James " Canal, owned by the James Canal Company; " the Plunkett Canal, owned by the Plunkett Canal

" Company; the Meacham Canal, owned by the
" Meacham Irrigation Canal Company; the Goose
" Lake Canal, owned by the Goose Lake Canal Com-
" pany; the Pioneer Canal, owned by the Pioneer
" Canal Company; the James and Dixon Canal, owned
" by the James and Dixon Canal Company; the Joyce
" Canal, owned by the Joyce Canal Company; the
" South Fork or Panama Canal, owned by the South
" Fork Canal Company; the Johnson Canal, owned
" by the Johnson Canal Company; That all of said
" above-named canal companies, except the South Fork
" Canal Company and the Johnson Canal Company are
" corporations duly organized and existing under and by
" virtue of the laws of the State of California; That
" more than five years next preceding the several times
" when, as in said complaint alleged, defendant did
" divert or take out water from said river, and more
" than five years next preceding the commencement
" of this action, said canal owners had, by virtue of a
" compliance by themselves, their respective prede-
" cessors in interest and grantors with the general and
" local customs and usages, laws and regulations (as
" well those of the United States as those of the State
" of California), in the matter of and relative to
" the appropriation, diversion, use and consumption
" of water and the acquisition of water rights within
" this State, acquired the right to take out, divert,
" appropriate, use and consume for irrigation and
" other beneficial uses, each through its said and re-
" spective canal, a large part and portion of the flow-
" ing waters of said river; That at, and for more than
" five years next preceding, all the said several times
" when, as in said complaint alleged, defendant took
" out or diverted water from said river, and at and
" more than five years next preceding the commence-
" ment of this action, said canal owners, under claim
" of right, did and now do openly, notoriously, con-

" tinuously, exclusively and adversely to plaintiffs and
" to all the world, take out and divert, appropriate,
" use and consume for irrigation and other beneficial
" uses, each through its said and respective canal, a
" large portion of the flowing waters of said river, so
" by it respectively acquired, ever and at all said times
" having and claiming the right so to do by virtue of
" the compliance with the general and local customs,
" usages, laws and regulations aforesaid; That
" the waters so taken out and diverted by said
" canal owners are and ever have been used and con-
" sumed in irrigation and other beneficial uses, and
" never again returned to the channel of said river;
" That after supplying to the said canals the said
" amounts of flowing water to which said canal owners
" are and during all the times herein mentioned have
" been entitled and accustomed to have and receive,
" and of right ought to have and receive from said
" river, there is not, and except in times of sudden
" floods and freshets, never has been sufficient water
" left or remaining in said river to, in its natural flow,
" flow down to or reach the lands or any part thereof
" in said complaint described; That of the surplus
" waters of said river, over and above the said amounts
" to which, as aforesaid, the said canal owners are,
" and during all the times herein mentioned have been
" entitled, and accustomed to receive from said river
" in said canals, the amount by defendant taken out
" or diverted is not and never has been sufficient to,
" if left to itself, in its natural flow, flow down to or
" reach the lands, or any part thereof, in said com-
" plaint described; That at and during all the times
" when, as in said complaint alleged, defendant took out
" or diverted water from said river, the water so taken
" out or diverted by defendant was, by defendant,
" taken out and diverted, appropriated, used and con-
" sumed with the knowledge, permission and consent,

" license and approval of said canal owners so having " the right and being entitled thereunto; That had de- " fendant refrained, ceased or abstained from taking " out and diverting said waters, the same would have " flowed to and into the said canals of said canal own- " ers, and have been by them appropriated, used and " consumed, and thereby diverted from said river and " prevented from flowing to or upon, by, through or " over the lands, or any part thereof in said complaint " described; That had defendant abstained from tak- " ing out or diverting said water, the same would " never have flowed down to or have reached the said " lands or any part thereof."

To which ruling of the Court the plaintiffs then and there duly excepted.

It was error to deny such motion.

The fact that the water of Kern River might not run to plaintiffs' land were it not diverted by defendant, because of other canal companies appropriating it, is no defence.

Ferrea v. *Knipe*, 28 Cal., 340.

It is no defence to this action that others, not parties to this suit, contribute to deprive the plaintiffs of the flow of water of Kern River through their lands, and that the appropriation by defendant did not materially affect the flow of such water.

Hill v. *Smith*, 32 Cal., 166.

Holsmans v. *Boiling Spring B. Co.*, 14 N. J. Eq., 335;

Richmond M. Co. v. *Atlantic, etc., Co.*, 10 R. I., 106;
Winn v. *Rulland* (Vt., Feb. 29, 1880), 1 Am. L. Rev. (N. S.), 334;

Although the mischief done by defendant alone might not amount to a nuisance, yet if he contribute to cause one he will be enjoined, whether the other contributing causes be human or natural agencies.

Wood Nuisances, § 820–821;
Buccleugh v. *Cowan* (Scotch), 5 Sess. Cas. (1866-7), 227;
Wood v. *Wand*, 3 W. H. & G., 772;
Crump v. *Lambert*, L. R. 3 ~~2 Ch. App.~~, Eq. Cas., 409;
Att'y Gen'l v. *Leeds*, L. R. 5. Ch. App. Cas., 583;
Swindon W. W. Co. v. *W., &c., Co.*, 7 L. R. (Eng. & I. App.), 707;
Crossley v. *Lightowler*, L. R. 2 Ch. App., 478.

If the defence sought to be made in the Fourth and Fifth Answers would be good as against our claim, then, all a defendant has to do when sued in a case like this, is to commit a separate and independent trespass and set it up and defeat an action to restrain the commission of the first trespass, and that was just what was done here.

W. B. Carr testifies that Haggin & Carr controlled the defendant, and had done so ever since its purchase by them in 1875 or 1876. (Trans. Vol. 2, fol. 2165).

And the testimony of Walter James shows that they controlled nearly all the other canals and owned nearly all the land irrigated from them, and used nearly all the water taken by them from Kern River, and here we call attention to the fact that we offered to prove by C. Brower, the Secretary of such companies, that Haggin & Carr owned a majority of the stock in them and controlled them all (Vol. 5, fol. 390-392), and the Court refused to permit us to do so.

The Court denied plaintiffs' motion to strike out as sham, irrelevant and redundant, the following portion of said answer, to wit:

"Defendant, admitting that at a point on or about "the southwest quarter of Section Thirteen (13), in "Township Twenty-nine (29) south, Range Twenty-"seven (27) east, Mount Diablo base and meridian, "according to the United States surveys, it takes out "of, and diverts from the said Kern River, a portion "of the surplus waters thereof, on its information and "belief, alleges:

"That below said point where defendant so takes "out and diverts said waters, there are, and from time "immemorial have been, large tracts of swamp and "overflowed lands, whereon, in times of freshets and "unusual floods, the said river has, from time imme-"morial, been wont to discharge its surplus waters, "thereby inundating and submerging said lands and "rendering them unfit for cultivation, and useless for "any purpose whatsoever, besides causing thereon the "formation of pools and ponds of standing water, "which, during the long and dry summers common to "that section of country, became foul and stagnant "and injurious to the health of both man and beast; "that said lands are and would be fertile, productive

" and of great value, if reclaimed from their swamp
" and overflowed condition; that said lands are owned
" by sundry and divers parties, some of whom are
" stockholders in the Kern River Land and Canal
" Company, this defendant; that owing to the nature
" and general topography of the surrounding coun-
" try, the said lands can be thoroughly and effectually
" reclaimed by preventing the surplus waters of said
" river from flowing down to, over and upon the same;
" that the only practicable or possible way by which
" such reclamation can be effected is by tapping said
" river at some point high up the same, and diverting
" therefrom and carrying off its surplus waters before
" they can flow to or reach said lands; that for the
" purpose of so reclaiming said lands from inundation
" and overflow, and thereby rendering them fit for
" cultivation and valuable for other purposes, defend-
" ant, for and at the request of the owners of said
" lands, has, at a great cost and expense to itself, con-
" structed its said Calloway Canal, leading from said
" river at a point high up the same, to wit: at the
" point hereinabove mentioned, and has thereby tapped
" the said river and opened up a drain or outlet
" through which a large portion of its surplus waters
" are and can be permanently diverted and carried off
" and prevented from flowing down, to and upon the
" said lands; that by so doing defendant has in fact
" prevented a large portion of the said waters from
" reaching said lands, and has thereby benefited and
" improved, and to a great extent reclaimed the same;
" that if defendant be permitted to continue so
" diverting and carrrying off said waters, defendant
" will, within a short time, have totally, permanently,
" and effectually reclaimed the said lands from inunda-
" tion and overflow, and have prevented the accu-
" mulation of foul and stagnant water thereon, and
" thereby have rendered said lands healthful and hab-

" itable and fit for cultivation, pasture and other use-
" ful purposes; that if defendant be now stopped or
" prohibited from continuing its said work of reclam-
" ation, within a short time hence, all the benefit it
" has conferred upon said lands, and all improvements
" it has thereunto wrought will be lost and destroyed,
" and the said lands will be restored to and again re-
" sume their swamp and overflowed condition, useless
" and worthless to man, and pestilent and unwhole-
" some to the surrounding country."

To which ruling of the Court the plaintiffs then and there duly excepted.

It was error to deny such motion.

The plaintiffs are entitled to have the water flow to their land, as in this answer it is alleged that it does, and they cannot be compelled to exchange this right for another.

Even a supposed benefit cannot be enforced upon them against their will, and in point of law the defendant has no right to substitute for a present existing right any other which it may deem to be an equivalent.

The private property of one man cannot be taken by another, simply because he can substitute an equivalent benefit.

Webb v. *Portland M. Co.*, 3 Sumn., 189.

If the several rulings were correct and the several defences should remain as a portion of defendant's answer being material to its defence, then the decision of the lower Court must be reversed for want of findings on such material issues, for all such allegations are deemed controverted by plaintiff.

§ 462, C. C. P.

In refusing to strike out the portions of the answer, the plaintiff moved to strike out, the lower Court held that they were material; that is, that the allegations were essential to the defence and could not be stricken out without leaving it insufficient.

§ 463, C. C. P.

Still we find no findings whatever on such "material issues."

It is unnecessary at this day to cite authorities in this Court that under the practice established by the Code of Civil Procedure, the lower Court is required to make findings upon all material issues, and failing to do so, the judgment for that reason alone cannot stand.

If the fact that the owners of the swamp and overflowed land referred to in the Sixth Answer, requested the defendant to construct the Calloway Canal and divert the water of Kern River (Vol. 1, fol. 253), and such fact was material to the defence, why no finding on it?

If it was material to the defence in this case to show that defendant had, by constructing the Calloway Canal and diverting the waters of Kern River, changed a "pestilent and unwholesome country" to and rendered it "healthful and habitable," why no finding on such fact?

If it was material to the defence to show that the water diverted from the river by defendant "was by "defendant taken out and diverted, appropriated and "consumed with the knowledge, permission and con- "sent, license and approval of said canal companies," why no finding on such fact?

This inquiry may suggest why no evidence as to such facts when so easily obtained by defendant? By calling Messrs. Haggin & Carr, they would undoubtedly have testified that, as owners of the lower canals,

they consented that the upper canal, the Calloway, should take the water from Kern River.

Mr. R. L. Dixon, a witness for defendant, who had charge of Mr. Haggin's Buena Vista Ranch, the ranch lowest down the river, did testify, when asked about those canals taking water from the river, and who did it. (Trans., Vol. 3., fol. 565.)

"Q.—Wasn't it a serious complaint on your part, "that the parties above were taking all the water out "of the river?

"A.—No, sir; not at all. It was Mr. Haggin's "ranch, and if he was taking the water I had no right "to complain.

"Q.—That is, if he was taking all of the water "above for his other ranches you had no right to "complain that you could not get any on the lower "ranch?

"A.—Of course not. It was not my interest. It "was his."

And folio 568, "Mr. Haggin acquired the Buena "Vista Ranch the 1st or 2d of July, 1877."

And folio 569, "Previous to 1877 I was on the fight "for water with Mr. Livermore and Mr. Haggin, all "of the time, in the fall of the year; in the spring I "had water. I made a crop of grain every year till "1879. Previous to 1877 I was always on the fight "with them for water. Since 1877, when Mr. Haggin "acquired the land, I have had no interest in it. If "the water did not come down it was not my lookout. "I could not make a crop without it."

If the facts that the other canal companies enumerated in the "Fourth and Fifth Answers," were all corporations (except two); that for more than five years they had been diverting water from Kern River, by virtue of a compliance with general custom and

usage, etc., and had acquired the right to take such water for irrigation, why no findings on such facts?

The testimony introduced by defendant in this case will be found in volumes 3 and 4 of this Transcript, and in all 858 pages. More than 250 pages of this, or five-seventeenths, is devoted to proving up the rights of canal companies, other than the defendant. So of the twenty days taken by defendant to prove up its case, six at least were taken up in placing this testimony before the Court.

The following is the defendant's t
the Calloway Canal:

WITNESS.	Volume.
James Dixon	3
H. A. Jastro.	3
R. L. Dixon	3
Wm. Souther	3
" "	3
F. P. May	3
J. O. Miller	3
Thos. Hoke	3
C. L. Conner	3
N. M. Brown	3
P. O'Hara	3
J. J. Darnul.	3
J. R. Watson	3
S. A. Burnap	3
J. Neideraur.	3
R. Meacham.	3
C. Christensen.	3
W. P. McCord.	3
" " "	3
" " "	3
" " "	3
A. C. Maude.	3
" "	3
W. J. Canfield	3
F. H. Colton	4
T. W. Barnes	4
F. H. Colton	4
M. W. Gates	4
S. H. Anderson	4
H. Noble	4
G. W. Parrish	4
W. James	4
" "	4
L. L. Dixon	4
T. R. Fillebrown.	4
W. R. McMurdo.	4
D. G. McLean	4

The following is the defendant's testimony as to appropriation, work and irrigation by canals other than the Calloway Canal:

WITNESS.	Volume.	From Folio	To Folio.	Total Folio.	REMARKS.
James Dixon	3	1	115	115	Gage Slough; Joice & Dixon, or Joice; James & Dixon; Johnson; Pioneer; Buena Vista; Stine; Wible; Railroad.
H. A. Jastro.	3	373	376	4	Kern Island.
R. L. Dixon	3	489	593	104	Joice; James & Dixon; Johnson; Railroad; Gage Slough.
Wm. Souther	3	625	727	102	Kern Island.
" "	3	734	764	30	Kern Island.
F. P. May	3	765	788	23	Farmers.
J. O. Miller	3	791	802	11	Wible, or Railroad.
Thos. Hoke	3	845	877	32	Stine; Buena Vista.
C. L. Conner	3	944	949	5	Kern Island.
N. M. Brown	3	1129	1147	18	Buena Vista.
P. O'Hara	3	1156	1206	50	Buena Vista.
J. J. Darnul	3	1206	1260	54	Beardsley.
J. R. Watson	3	1261	1280	20	Buena Vista.
S. A. Burnap	3	1281	1301	20	Stine.
J. Neideraur	3	1302	1321	20	Baker & Noble, and Anderson.
R. Meacham.	3	1322	1351	30	Meacham.
C. Christensen.	3	1351	1372	20	Meacham.
W. P. McCord.	3	1445	1466	20	McCord.
" " "	3	1482	1487	5	Baker & Noble, and Anderson.
" " "	3	1488	1499	11	McCord.
" " "	3	1507	1516	9	Baker & Noble, and Anderson.
A. C. Maude.	3	1629	1634	5	Plunkett.
" "	3	1666	1669	3	Plunkett.
W. J. Canfield	3	1677	1695	22	Buena Vista.
F. H. Colton	4	85	142	57	Kern Island.
T. W. Barnes	4	142	157	15	Buena Vista.
F. H. Colton	4	158	163	5	Kern Island.
M. W. Gates	4	163	173	10	Gates.
S. H. Anderson	4	174	189	15	Kern Island.
H. Noble	4	189	201	12	Baker & Noble.
G. W. Parrish	4	378	390	12	Parrish & Wilson.
W. James	4	888	963	75	All Ditches.
" "	4	974	1003	30	All Ditches.
L. L. Dixon	4	1010	1033	23	Kern Island.
T. R. Fillebrown.	4	1056	1060	4	Kern Island.
W. R. McMurdo.	4	1209	1222	13	Kern Island; Beardsley; Farmers.
D. G. McLean	4	1543	1550	7	Pioneer.
				1013	

And all of this testimony went in support of special defences, that plaintiff had moved to strike out as irrelevant and redundant, and also under an objection made by plaintiffs, that all of such testimony was irrelevant and immaterial.

If the rulings on our motion to strike out such special defences were correct, then such defences or allegations were material to defendant's defence, and they could not have been stricken from the answer without leaving the defence insufficient.

C. C. P., § 463.

The separate answers were statements of new matter in avoidance, and constituted a defence to plaintiff's action, and they were deemed controverted by plaintiffs.

§ 462, C. C. P.

They were therefore issues that the Court had, on the motion to strike out, decided were material issues in this case.

On each of the twenty days that defendant was putting in its evidence the Court reiterated that decision, when the plaintiffs objected to any evidence as to the right of the canal companies that were not parties to this suit, as irrelevant and immaterial.

If the rulings on such motions to strike out, and the rulings admitting evidence in support of the allegations setting up such rights of outside canal companies were correct, then this case must go back for a new trial, for want of findings on material issues. We see no escape from this conclusion, and we hardly think it lies in the mouth of defendant to now say that the special defences that they took six days to try and establish, and which they insisted should remain in their pleading as material and necessary to their defence, raise only immaterial issues, and therefore no finding on them is required.

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We objected to all the evidence offered by the defendant to establish such facts, on the ground that it was immaterial. The Court held it was material, and all the evidence went in, thus again deciding all such allegations were material to defendant's defence.

Still we have no findings on any of such "*material issues.*"

When an answer sets up an affirmative defence, the finding must respond thereto.

Phipps v. *Harlan*, 53 Cal., 87;
Johnson v. *Squires*, 53 Cal., 37;
Bosquett v. *Crane*, 51 Cal., 505.

The plaintiffs complain of the following rulings of the Court during the progress of the trial:

I.

It was error to refuse to permit the witness, F. A. Tracy, to testify as to whether he could have gone in a boat from Tracy's Crossing to Tulare Lake and the San Joaquin River. (Trans., Vol. 2, fols. 1027–8.)

We know of no better way for us to have shown that there was a water course or channel through plaintiff's land into Tulare Lake than by showing whether or not it could be navigated by boats, and the question was not leading; it did not suggest to the witness the answer desired by plaintiff.

§ 2046, C. C. P.

II.

It was error to permit the witness, Philo D. Jewett, to testify, on cross-examination, as to a conversation he had with Thomas Baker in relation to the purpose of constructing the Baker dam. (Trans., Vol. 2, fol. 1230.)

It was hearsay testimony. The acts or declarations of Baker could not affect the plaintiffs.

§ 1848, C. C. P.

III.

It was error to admit in evidence the printed copy of report made by B. S. Alexander, George Davidson and George H. Mendell to J. B. Haggin, dated November 16, 1877. It was but a private writing, and the original should have been produced. (Trans., Vol. 2, fol. 1575.)

§ 1937, C. C. P.

IV.

It was error to refuse to admit in evidence the photographs taken by C. E. Watkins to show the relative dimensions of the objects they represented. (Trans., Vol. 2, fol. 2318.)

Mr. Watkins testified that the photographs were taken at different points on Kern River and Buena Vista Slough, showing the channel of those streams, the existence and size of which plaintiff sought in this case to establish. The witness testified that from the natural objects shown in the photographs, it was an easy matter to arrive at the relative proportions of the other objects shown in the photographs. From those natural objects of known size, it was an easy matter to determine by means of the photographs the width of the water course we were seeking to establish.

V.

It was error to permit the witness, J. C. Crocker, to testify, on cross-examination, as to his authority to act for Miller & Lux in regard to the lands in suit. (Trans., Vol. 2, fol. 2363.) Such authority must be evidenced by a writing, and should have been proved by producing the writing; it could not be estab-

lished by parol evidence. That such authority relating to real property, or "over or concerning it, can "not be created, granted, etc., except by an instru- "ment in writing signed by the party."

§ 1971, C. C. P.

VI.

The Court erred in admitting in evidence the power of attorney from Miller & Lux to James C. Crocker, its execution not having been proven. (Trans. Vol 2, fol. 2364).

No instrument in writing can be admitted in evidence until its execution is proven. No attempt was made to show that Miller or Lux ever signed the power of attorney, or that it was delivered to Crocker, or that he ever knew of the existence of such a power of attorney.

Execution of an instrument is the subscribing and delivering it.

C. C. P., Sec. 1933.

VII.

It was error to strike out testimony of the witness J. C. Crocker to the effect that the plaintiffs went into possession of the land when they purchased it in 1869 or 1870. (Trans., Vol. 3, fol. 135.)

The plaintiff should have been permitted to have shown just when they first went into possession of the land, and how and for what purpose they occupied it, as it was denied by defendant that the plaintiffs had ever occupied the land at any time, or for any purpose, and the importance of the evidence appears from the fact that the Court finds (finding 80), that plaintiffs have not put the land to any use or taken or had any possession of it prior to the dates of the patents received by them for the land.

VIII.

It was error to admit in evidence the recorded notice of water claim of the Pioneer Canal, dated April 26, 1873, and recorded May 16, 1876. (Trans., Vol. 3, folios 66–68.)

1. The original was not accounted for; it was not proven that the copy introduced in evidence was a true copy.

2. There was no evidence that the notice was signed by any one.

3. The record is not evidence, as the notice was not entitled to be recorded, not being acknowledged by the parties purporting to have signed it.

4. There was no evidence of the posting of any such notice, either within ten days prior to its record, or at any time.

(1.) The only evidence offered in relation to the copy claimed to have been posted was that of James Dixon, who testified (Trans., Vol. 3, fol. 59): "My "first knowledge of the ditch was when I went up "there to post a notice of the James & Dixon claim. "I found that they had posted a notice for a similar "ditch, the party taking out of the Pioneer Canal. * * * "When I went to post the James & Dixon "notice, I heard that there was a ditch company "ahead of me; then I looked for it and found this "notice.

(Fol. 60–61): "I think I remember the substance "of it. * * * I cannot say that I saw any notice "there more than once. * * * I don't remember "having seen it again. * * * I recollect the gen- "eral features of the notice. We had a prior right to "the water, and of course I noticed to see how much "they had filed on; what their proportion amounted

" to. I have not seen that notice since. I don't think
" I have ever seen it since. I have only seen it once.
" I was there just long enough to read it over, and I
" remember the substance of the claim, I think. I
" don't remember all of the names that were signed to
" it. There was a large number of names on it. I
" remember some, but not all. I will call out all that I
" remember, D. K. Said, Groshong; I don't know his
" initials; George W. Darden, I believe his name is;
" Mrs. Said. I don't remember any others. I don't
" remember how many names there were. It was not
" a material matter to me. I think I remember the
" width of the canal as stated in the notice. I think
" it was thirty feet on the bottom. I don't remember
" the land that was given in that notice upon which the
" water was to be used, or whether there were sections
" described in it. I don't remember whether it con-
" tained the sections or not. I remember the course
" that the ditch was to pursue, and I saw the course
" that it did pursue, on the work. The description of
" the land in the notice, I don't remember whether it
" was in sections or not. I know it was to run in a
" westerly direction, along a dry channel, and that is
" all I remember. I don't remember sections at all.
" I don't know the description of the land by sections.
" I know the course that the ditch was to pursue, and
" I would like to state that I know the course that
" the ditch was to pursue; and I would like to state
" that I know that anyway, now, from having seen the
" ditch running with water, and I know the general
" description in the notice of appropriation. I don't
" know whether it was in sections or whether certain
" sections of land were mentioned to be irrigated from
" the ditch or not."

It will be seen that no attempt was made to account for the absence of the original notice.

Had the fullest proof of the correctness of this copy been produced, the copy would not have been admissible in evidence.

This question has been fairly presented to the Supreme Court of this State in a case where a party sought to introduce a copy of a mining claim, and in that case the Court say:

"This is an action to recover possession of a mining "claim. On the trial of the case, the defendant read "in evidence a copy of a notice shown to have been "posted on the claim in question, and purporting to "be a notice signed by the plaintiff, and those from "whom he purchased. No foundation was laid for the "introduction of this evidence, and its admission was, "therefore, erroneous. The absence of the notice was "not accounted for, nor was it shown that the plaintiff "had been notified to produce it. The evidence was "secondary in its character, and was admissible upon "the same terms which control the introduction of such "evidence in other cases. It could only be resorted "to if the higher evidence of the notice itself was not "attainable, and to render its introduction proper, "that fact should have been shown.

"Judgment reversed, and cause remanded for a "new trial."

Lombardo v. *Ferguson*, 15 Cal., 373.

It will be seen that the case was reversed for this error alone.

See also—

Folsom's Heirs v. *Scott*, 6 Cal., 460;

Macy v. *Goodwin*, 6 Cal., 579.

In both of the above cases the judgment of the lower Court was reversed for the same error.

This is also now established as the rule under which any copy may be offered in evidence by the

C. C. P., § 1951.

The testimony of Dixon did not show that the recorded copy was a true copy of the notice posted. It is not enough that the witness testifies that it is substantially the same.

In a case decided by the Supreme Court of Arkansas it was decided that "an instrument not legally "authorized to be recorded, the record cannot be "introduced as evidence. Nor can a copy, where the "witness testifies that he has not compared the copy "with the original, and he does not say it is an exact "or true copy. *All he states is that he believes the con-* "*tents of the two instruments are substantially the same,* "*but he has not seen the original for years.*"

Brown v. *Hicks*, 1 Ark., 232;
Eaton v. *Freeman*, 63 Ga., 538.

The Book of Registry of Deeds contain only copies of originals, and are but secondary evidence, and are not admissible without accounting for the non-production of the original or primary evidence, unless when the statute makes the recorded copy supply the place of the primary evidence; and then to render it admissible the statute must be complied with.

5 U. S. Digest, p. 785, Sub. 6218, and authorities cited.

In this State the Code does not make the recorded copy supply the place of the primary evidence, and the requirements of the statutes have not been complied with.

(2.) There was no evidence that the notice was ever executed. No evidence that any one ever signed it, and no attempt to show how or when the names it bore were placed on it. Not one of the nine persons whose

names are found annexed to the notice is called as a witness.

It is an elementary principle of law that no instrument in writing can be admitted in evidence until its execution is proven. If citations of authorities on this point is necessary, we need only refer to 5 U. S. Digest, p. 723, § 4837, and authorities cited.

(3.) The record of the notice was not admissible in evidence, it never having been *duly* recorded.

Such a record can only be admitted in evidence when it appears that the recorded instrument was acknowledged or proved, and then with "like effect" as the original.

§ 1951, C. C. P.

A copy of a paper recorded, but not acknowledged, cannot be read in evidence without proof of its execution. The copy is not, by the statute, made superior to the original. It may be introduced "with like effect" as the original.

Powell's Heirs v. *Hendricks*, 3 Cal., 429.

It is only copies of records of instruments acknowledged or proved that can be read in evidence "without further proof."

§ 1951, C. C. P.

An instrument cannot be "recorded" (except patents from the United States or the State, and certain judgments), unless it "be acknowledged by the person "executing it, or proved as required by §§ 1198 and "1199 of the Civil Code."

§ 1161, C. C.

"An instrument is *deemed* recorded when, being "duly acknowledged or proved and certified, it is

" deposited in the Recorder's Office, with the proper " officer, for record."

§ 1170, C. C.

A deed found recorded, that is not entitled to be recorded, cannot be read in evidence without proof of its execution.

Wilson v. *Corbier*, 13 Cal., 166;
Landers v. *Bolton*, 26 Cal., 393;
5 U. S. Digest, p. 788, Sub. 6292.

In *McMinn* v. *O'Connor*, 27 Cal., 238, it was clearly stated under what circumstances and rules of law copies of recorded deeds could be used in evidence, and referring to Section 30 of the Act of 1850 (p. 252), which is the same, in substance, as § 1951, C. C. P. The Court say: (p. 244)

" Under the Act referred to, it was incumbent on a " party who resorted to proof of a deed by producing " a copy of it certified as prescribed, to establish the " fact that the deed itself was lost or beyond his con- " trol, before he could avail himself of the use of a " copy."

Then referring to § 21 of the same Act, which is the same in effect as § 1951, C. C. P., the Court say:

" The certified copy of a duly filed and recorded " deed was proof of its execution, because the execu- " tion of it by the grantor necessarily had to exist as a " condition precedent to its becoming duly recorded. " * * * *Therefore, a certified copy of a deed not " acknowledged or proved does not prove the genuineness " and due execution of the deed itself, and hence it is " necessary, in order to make the certified copy evidence, to " prove the existence of the original deed, and that it was " executed by the person purporting in the copy thereof to " be the grantor."

The Legislature has passed Acts curing defective

recording of instruments, and providing that copies of such records should be received in evidence; but in no case has such copy ever been permitted in evidence unless the genuineness and execution of the originals were first established.

In other words, the Legislature has never made a copy of an instrument superior as evidence to the original. Should it have done so, a party would only have to lose a recorded deed, get a certified copy, and avoid all objections to its execution.

No one will pretend that an original instrument can be read in evidence until the signature of the party or parties purported to have been made are proven.

A deed not properly recorded cannot be admitted in evidence. Before such a deed can be admitted the fact of its execution must be properly established.

Smith v. *Brannan*, 13 Cal., 107;
5 U. S. Digest, p. 788, Sub. 6293.

If an instrument be duly recorded, this fact, of itself, furnishes sufficient *prima facie* evidence that it was duly executed, and the original, if produced, may be read in evidence without further proof.

Mayo v. *Mazeaux*, 38 Cal., 449.

But to make the copy admissible, the loss of the original must be accounted for.

Mayo v. *Mazeaux*, 38 Cal., 449.

If additional authorities are needed on a proposition which is elementary, we call attention to a decision by the Supreme Court of Indiana, where the point was clearly made and decided, the statute of Indiana being similar to that of California.

Section 18, Indiana laws, concerning conveyances; is—

"To entitle any conveyance, mortgage, or instru-

" ment of writing to be recorded, it shall be acknowl-
" edged by the grantor," etc.

Section 283, p. 15, 2 R. S.

" Exemplifications or copies of records and records
" of deeds or other instruments, * * * shall be
" proved or admitted as legal evidence in any Court,"
etc.

The record of a deed found in Record of Deeds, but not acknowledged, was offered and admitted in evidence, against objection of appellant. The Supreme Court reversed the judgment. Holding that a deed not acknowledged was not entitled to be recorded. (1 R. S., 1876, p. 365, § 18.) Not being entitled to be recorded, the record of it was not evidence. (2 R. S., 1876, p. 150, § 283.)

Westerman v. *Foster*, 57 Ind., 409;

Morrison v. *Coad*, 49 Iowa, 571;

Gwynn v. *Frazier*, 33 Mo., 89. (In wrong county properly acknowledged);

Gentry v. *Garth*, 10 Mo., 226. (No certificate of the acknowledgment thereof, not admissible.)

Instruments found recorded, but not acknowledged, cannot be received in evidence without satisfactory proof of the execution of the original and the truth of the copy.

Musick v. *Barney*, 49 Mo., 458.

It is a general rule that a record not made in accordance with the law relating to the recording of instruments, is *incompetent* evidence to prove the original, and so *a fortiori* as to a copy thereof; for in such cases the record amounts to no more than a mere unofficial entry of the officer.

Franwell v. *Thurmond*, 17 Ark., 218;

4 Cow. & Hill's Notes, Phil. Ev., part 2, p. 458.

Before a copy can be introduced in evidence there must be proof of execution, and that the copy introduced has been compared with the original.

Franwell v. *Thurmond*, 17 Ark., 218;
4 Cowell & Hill's Notes, Phil. Ev., part 2, p. 459;
Ruslin v. *Shields*, 11 Ga., 636;
Dixon v. *Thatcher*, 14 Ark., 147;
Maxwell v. *Light*, 1 Call. (Va.), 121;
Brown v. *Cady*, 11 Mich., 536.

In each of the four last cases cited the judgment of the lower Court was reversed for admitting in evidence the record of an instrument not duly acknowledged, and therefore not entitled to be recorded.

A deed not properly acknowledged is not prepared for record, and though recorded is not admissible in evidence without proof of execution.

Eaton v. *Freeman*, 58 Ga., 130.

There must be proof of loss of the original, of its execution, and that it is a true copy. The record imparts no verity, as it was unauthorized.

Eaton v. *Freeman*, 63 Ga., 538.

An instrument registered without authority of law, is an unofficial act of the officer, and could give a copy no greater validity than the original, deprived of legal evidence of its validity.

Neither a copy of it, nor an express certificate of it, would be legal evidence of the fact in a Court of justice.

Kerns v. *Swope*, 2 Watts, 78.

Buddy Brooke, 43 Am. Dec. 333

When the law does not authorize an instrument to be recorded, an official copy of the record is not in general admissible in evidence.

1 Green. Ev., § 485, *n.* 572.

This principle is too familiar to require the citation of the numerous cases in which it is asserted.

Wendall v. *Abbott*, 23 N. H., 73.

In Illinois a statute authorizes the recording a contract for sale of real property without acknowledgment or proof of execution, still the Supreme Court of that State held that a certified copy of the record is not evidence until the instrument is acknowledged or proved as required by law.

McCormick v. *Evans*, 33 Ill., 330.

In general, a record not made in accordance with the law relating to the recording of instruments, is *incompetent* evidence to prove the original, and so *a fortiori*, as to a copy thereof; for, in such cases, the record amounts to no more than a mere unofficial entry of the officer.

2 Phil. Ev., H. & C. Notes, p. 583, n. 479, and numerous cases cited.

When a statute provides that a deed shall not be valid against any person except the grantor, unless recorded, etc., inasmuch as it cannot be recorded unless acknowledged or proved, one of these prerequisites is necessarily implied in the term recorded, and according to the well known rule of omitting unnecessary and superfluous words, what is necessarily implied is omitted, and such a clause will be read as if it stood; "no conveyance shall be valid against others "than the grantor, etc., unless by deed (acknowledged "by the grantor or proved) and recorded as required "by law."

Dole v. *Thurlow*, 12 Met., 163.

A paper purporting to be record of a deed, and not duly acknowledged, is not admissible in evidence, either as a record or as a copy of a deed.

Doe v. *Roe*, 1 Jno. Cases, 402.

Where copies are made evidence by the statute, the mode of authentication required must be strictly pursued. The Legislature may establish new rules of evidence in derogation of the common law, but the judicial power is limited to the rules laid down.

Smith v. *U. S.*, 5 Pet., 300.

It will be claimed by defendant's counsel that the Title (VIII.) of the Civil Code, relating to water rights, does not require the notice to be acknowledged before being recorded.

1. The statute required the notice to be recorded.
   C. C., § 1415.

The section requiring acknowldgements before recording is general, and applies to all "*instruments*" except judgments and patents.

C. C., § 1161.

That a water notice is an "*instrument*," see the following authorities:

Instrument is most frequently used "to denote "something reduced to writing as a means of evidence. "It is *nomen generalissimum* for bills, bonds, conveyances, leases, mortgages, promissory notes, wills, "and the like, but scarcely includes accounts, letters, "etc., where the creation of evidence to bind the "party, or the establishment of an obligation or *title*, "is not the primary object.

Abbott Law Dict., Title, "*Instrument.*"

Instrument. "A writing as a means of giving formal expression or effect to some act; a writing "expressive of some act, contract, process, or proceeding, as a deed, writ," etc.

Burrill's Law Dict., Title, "Instrument."

Instrument. "A formal legal writing; *e. g.*, a record, "charter, deed, or written agreement."

Wharton's Law Lexicon, Title, "Instrument."

An instrument is deemed to be recorded when *acknowledged*, etc., and deposited with the Recorder.

Civil Code, § 1170.

Section 1948, C. C. P., provides for acknowledgment and proof of all writings, except wills and testaments.

And Section 4480, Polit. Code, provides that *all parts* of the Codes are to be construed together, and effect given to all, and to be considered as passed at the same time.

This is but a declaration of what the rule has always been.

"In construing a law, effect must be given to every "clause and section of it, so as to make the whole Act "consistent and harmonious."

Sedgwick, C. & S. Law, p. 238.

It is an invariable rule of construction to start out with the assumption that some effect is to be given, if possible, to every provision of the statute.

People v. *Waterman*, 31 Cal., 415.

It is a rule of universal application, in construing a statute, that some effect shall be given, if practicable, to every part of it, and that apparent inconsistencies shall be reconciled, if it can be done without torturing the language.

People v. *Southwell*, 46 Cal., 148.

It was error to admit in evidence the copy of notice of appropriation of water from Kern River, dated August 7, 1875. (Defendants' Exhibit G.)

Trans., Vol. 3, fol. 82.

It appeared affirmatively that the notice was never signed but by two of the parties whose names were annexed to it.

The witness, James Dixon (Vol. 3, fol. 79), testifies that the first four signatures are in the hand writing of his father, and the notice is also in his hand writing, and that he, witness, added the other three signatures, including his own.

The father of the witness, James Dixon, was called as a witness (R. L. Dixon), who testified that he signed his name and four others to it. But no attempt is made to show that he had any authority authorizing him to sign such names. (Vol. 3, fol. 544.)

The execution of the instrument was not proven.

The changes appearing on the face of the instrument were not satisfactorily accounted for.

§ 1982, C. C. P.

We have presented this point very fully, for the reason that the same error is complained of as to some dozen rulings of the Court and covered by the following assignments of error: Nos. 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 24, 27, 28, 29, 32 to 42, 68, 69, 70, 84, 91, 94, 97, 98, 99, 105, 106, 107.

We also objected to certain notices being read in evidence, on the ground that the notices failed to state the facts required by the statute.

It was error to admit any of such notices in evidence, they not being sufficient to confer any rights upon any one.

To acquire rights under any statute, the statute must be strictly followed. This has been so often decided by our Supreme Court that citations of authorities is unnecessary.

The statute requires, § 1415 Civ. Code:

a. That the person must post and record a notice claiming a certain number of inches of water measured under a four-inch pressure.

Notices were admitted in evidence, in which nothing was stated as to the amount of water claimed.

Trans., Vol. 3, folios 1193–5;
" " 3, " 1223–4;
" " 3, " 1345.

b. The notice was required to state the purpose for which the water was claimed.

Notices were admitted in evidence, entirely silent as to the use the water was to be put to.

Trans., Vol. 3, folios 1193–5;
" " 3, " 1223.

c. Its place of intended use.

Notices were admitted in evidence giving no place of intended use.

Trans., Vol. 3, folios 1193–5;
" " 3, " 1223.

d. The means by which the water would be diverted, and size of flume, ditch, pipe or aqueduct.

Notices were admitted in evidence in which flumes, ditches, pipes or aqueducts are not mentioned.

Trans., Vol. 3, folio 1193;
" " 3, " 1223.

The notice admitted in evidence, signed by Swinney and others (Vol. 3, fol. 1223–4), was not a water claim at all, it is a claim of right of way for a water ditch.

4. It was error to admit the notices in evidence, as it appeared affirmatively that the statute providing for posting and recording such notices had not been complied with.

The Civil Code, § 1415, says:

" A copy of the notice must, within ten days after it " is posted, be recorded," etc.

of Pioneer Canal

It appears that this pretended copy of notice was not recorded until at least sixteen days after it was posted.

The only witness who testifies to the posting of the notice is James Dixon, who testifies (Trans., Vol. 3, folio 59). "My first knowledge of the ditch, to see "and notice its position there, was when I went there "to post a notice of the James & Dixon claim. I "found that they had posted a notice for a similar "ditch, the party taking out of the Pioneer Canal."

And by going back to Trans., Vol. 3, folio 43, we find the time fixed when he posted this notice of the James & Dixon Canal.

"I posted the notice (James & Dixon), in the latter part of April, 1873.

And the witness further says in referring to this Pioneer notice (Trans., Vol. 3, folio 61): "I have "only seen it once. I was there just long enough to "read it over."

The James & Dixon notice is dated April 29, so the witness must have seen the posted notice of the Pioneer on the 29th or 30th of April. (It is dated April 26, 1873. Trans., Vol. 3, folio 65.) Still it is not recorded until May 16th, 1873, at least sixteen days after Dixon says he saw it posted.

A notice was admitted in evidence, when it was admitted that it had not been recorded, and others recorded more than ten days after posting.

Trans., Vol 3, folios 66 to 68. Posted April 26. Recorded May 16.

Trans., Vol. 3, folios 1212–3, Notice never recorded.

Trans., Vol. 3, folios 1222–3. Dated February 2, 1873. Recorded August 28, 1874.

It was error to permit the copy of the record to be shown to the witness Dixon, and ask him if it was a true copy of the original. (Trans., Vol. 3, folios 63–4.)

It was not an instrument written by himself.

Sec. 2047 C. C. P.

But he is not even shown what purported to be a copy of such notice, but a copy of a copy. He should have been shown the copy that was recorded.

Dyer v. *Hudson* (No. 7226), Sup. Ct. Cal., Feb. 5, 1883.

An instrument not properly acknowledged cannot be introduced in evidence, nor can a copy be shown to a witness for him to testify to its genuineness. He must be shown the original.

McDuffie v. *Greenway*, 24 Tex., 629.

This error was repeated in connection with at least eight notices offered in evidence by the defendant and an exception taken to each ruling of the Court. See following assignments of error, Nos. 33, 35, 41, 68, 76, 81, 98, 106.

IX.

Evidence was introduced by defendant as to the posting and recording of notices of certain canals, and as to the amount of water appropriation by them, and the acreage of land irrigated from them, although there was no reference to such canal companies in the answer of defendant.

To such evidence we made the additional objection that it was not admissible under the pleadings, and that objection was overruled. (Vol. 3, fol. 1457; Vol. 4, fol. 380 and 954.)

If the facts set up in the separate defences, where the rights of certain canal companies were set forth, were

material to the defence of defendant, then they were required to set them up, for the rule is that "each "party must allege every fact which he is required to "prove." But the rule does not stop there, and such party "will be precluded from proving any fact not "alleged."

Green v. *Palmer*, 15 Cal., 415.

Again: "A defendant must not allege anything "affirmatively which he is not required to prove."

Green v. *Palmer*, 15 Cal., 415.

Such being the rule, it was error to permit the defendant to prove up the rights of the canal companies, when their rights were not set up in the answer, or if not, then the Court erred in refusing to strike out that portion of the answer setting up the rights of certain canal companies. The two rulings cannot stand together; if one be good, the other must necessarily be bad.

An answer of a defendant shall contain a statement of any new matter constituting a defence.

Sub. 2, § 437, C. C. P.

"The language of this section is very clear, that this "new matter, whatever it may be, must be set up in "the answer." The question then arises: what is "'new matter' in the contemplation of the Code "itself? New matter is that which, under the rules "of evidence the defendant must affirmatively estab- "lish. If the *onus* of proof is thrown upon the de- "fendant, the matter to be proved by him is new "matter. * * * The language of the Code is "explicit that the 'answer shall contain a statement "'of *any* new matter constituting a defence.' The "Code makes no distinction between different classes

" of new matter. *All* new matter of defence must be " stated in the answer.

" This feature of the Code is one of the most bene- " ficial and obvious improvements upon the former " system. The classification of defences is simple, " logical, and just. Each party is distinctly apprised " of all the allegations to be proven by the other; and " each is, therefore, prepared to meet the proofs of his " adversary. The plaintiff is compelled to set out " every fact necessary to constitute his cause of action, " and the defendant every new matter of defence. This " is required by the true principle of pleading." (Ch. " Plea., 526.)

Piercy v. *Sabin*, 10 Cal., 27–8.

And unless such matter is set up in the answer it cannot be offered in evidence.

Piercy v. *Sabin*, 10 Cal., 22.

In the case of

Coles v. *Soulsby*, 21 Cal., 50,

Evidence in support of an affirmative defence was admitted (such defence not being specially pleaded,) against the objection of the plaintiff, and the Court say:

" New matter which must be specially pleaded, is " that matter which the defendant must affirmatively " establish. Defences of this character must be dis- " tinctly set up in the answer, or evidence to establish " it will be inaadmissible. This view disposes of the " appeal and necessitates a reversal of the judg- " ment."

The Supreme Court reversed the judgment in the case of

Glaser v. *Clift*, 10 Cal., 303,

On the single point that evidence was admitted in

support of a defence that should have been pleaded as "new matter."

Moor v. *Shear*, 30 Cal., 472.

A defendant who would avail himself of new matter as a defence, must set it up affirmatively in his answer.

The statute is intended to require each party to make a plain, concise, and distinct statement of the facts he intended to prove, in order to maintain his cause of action, or his defence to the action, and thereby inform the adverse party of the precise grounds upon which he intends to rely.

The A. & N. R. R. v. *Washburn*, 5 Neb., 124, and authorities cited;

McKyring v. *Bull*, 16 N. Y., 308.

X.

Witnesses were permitted also to testify as to the amount of land irrigated by other canals taking water out of Kern River.

All the evidence relating to the use made by these outside canal companies, and where used, was immaterial, and went in under objection made by plaintiffs. The only purpose that it could or did answer in this case was to show that all the canals were controlled by Messrs. Haggin & Carr, who controlled and owned the defendant canal, and that very little land was irrigated from any of the canals that was not owned by Messrs. Haggin & Carr.

Nearly all the land irrigated from the Farmers' Canal was owned by Haggin & Carr. (Vol. 4, fol. 90–1.) The witness, Walter James, says that water was being used by Portuguese, but by turning to the cross-examination of the witness on fol. 976, it will be found that these Portuguese were all tenants of Haggin & Carr. Another peculiar feature of the examination of this witness is this:

Counsel for defendant commenced to show by this witness the numerous parties who were using water from Kern River. After questioning the witness as to ownership of lands irrigated from two canals, the Farmers' and Stine (Vol. 4, fol. 900 to 915), and disguising ownership under such answers as "water was used "by Portuguese, by Mexicans," (who were all shown on cross-examination to be tenants of Haggin & Carr), it still appeared that outside of the possessions of Haggin & Carr, comparatively little land was irrigated from the canals.

When they questioned the witness as to the third ditch, the Anderson, they do not go into the question of ownership of land irrigated, but simply ask what land is irrigated from the canal or ditch (Vol. 4, fol. 916), and so on to the end of the chapter.

But on cross-examination we made it clearly appear that Haggin & Carr owned nearly all the land irrigated from all the canals testified to by the witness on his direct examination, and also the canals.

Haggin & Carr own and control the Stine Canal. (Vol. 4, fol. 980.)

Haggin & Carr own and control the Gates' Canal. (Vol. 4, fol. 982.)

Haggin & Carr own and control the Baker & Noble Ditch. (Vol. 4, fol. 982.)

Haggin & Carr own a majority of the stock in the Buena Vista Canal. (Vol. 4, fol. 982.)

Haggin & Carr own and control the Plunkett Canal. (Vol. 4, fol. 989.)

Haggin & Carr own largely in the Pioneer Canal, but I don't known that they control it. (Vol. 4, fol. 991.)

Haggin & Carr control the James and Dixon, I believe. (Vol. 4, fol. 993.)

Haggin & Carr control the Joice Ditch. I believe they own it. (Vol. 4, fol. 995.)

Haggin & Carr own nearly all land irrigated from the Farmers' Canal. (Vol. 4, fol. 900–3 and 976–7.)

The same as to Stine. (Vol. 4, fol. 912–13 and 977–8.)

All irrigated from the Baker & Noble Ditch is owned by Haggin & Carr. (Vol. 4, fol. 981.)

The same as to the Gates' Canal. (Vol. 4, fol. 981.)

At this point, after a judicious suggestion from defendant's counsel, that the witness might not know the amount of land irrigated from Buena Vista Canal that belongs to Haggin & Carr (Vol. 4, fol. 983), the witness is not so positive as to amount of land owned by Haggin & Carr.

But he does know that this canal runs through Sections 4, 9, 8, 17, 19, 20 and 35, all of which are owned by Haggin & Carr, and that a great portion of the land irrigated from the canal belongs to Haggin & Carr, "but I cannot say that the greater portion does." (Vol. 4, fol. 984), and at folio 986 the witness says: "the greater portion of the land, 2000 or 2500 acres, "that can be irrigated by this canal is owned by Hag- "gin & Carr."

Of the 700 acres subject to irrigation, from the Plunket Canal, the most of it is in the Belle View Ranch (Haggin & Carr's.) (Vol. 4, fol. 989.)

Of the three sections irrigated from the James & Dixon and the Johnson Canals, about two and one-half sections are occupied by Haggin & Carr, or their tenants. (Vol. 4, fol. 993.)

"1200 acres of land are irrigated from that ditch "(Joice), I believe. It all belongs to Haggin & Carr.', (Vol. 4, fol. 996.)

The witness D. G. McLean testified: "I have charge "of the Goose Lake Canal. It belongs to Haggin & "Carr. (Vol. 4, fol. 1543.) I have been Superintend- "ent of the Pioneer Canal since 1876. Haggin & Carr "own the most of it." (Vol. 4, fol. 1549.)

And the plaintiffs offered to prove by the Secretary of canal companies, C. Brower, that Haggin & Carr owned nearly all the stock in the canal companies taking water from Kern River, and that they controlled the companies, and the Court refused to permit them to do so. (Vol. 5, fol. 390–2.)

Then coming to the canal company defendant, the witness, James, says: Of 13,000 acres of land irrigated from the Calloway Canal, the most of it was cultivated by tenants of Haggin & Carr. (Vol. 4, fol. 968.)

Counsel for defendant wanted not only to have the rights as between all canal companies taking water from Kern River and the plaintiffs litigated in this case, although such companies were not, and under the decision of this Court, could not, be parties to this action, but they seemingly wanted also, to settle the rights of such outside canal companies as between themselves.

XI.

The witness, D. G. McLean, Superintendent of the Pioneer and Goose Lake Canals of Haggin & Carr, testified that he turned water into Goose Lake Slough in the spring of 1878, for the benefit of the Kern Valley Water Company.

He was then asked how he happened to do that, and against our objection that it was irrelevant and immaterial, he was permitted to testify, that it was at the request of Mr. Wible and Mr. Souther. (Vol. 4, folio 1525.)

And Mr. Wible was also examined as to the same matter. (Vol. 4, fol. 1528.)

We would request counsel for defendant to show wherein this testimony was relevant or material to any issue raised in this case.

In this connection we also call attention to the ruling of the Court in permitting the witness, W. B. Carr, to testify relating to a conversation he had with S. W. Wible in February, 1878, in relation to turning water into Goose Lake Slough. (Vol. 4, folio 1657.)

Wible in no manner represented the plaintiffs in this case, but seems to have been an agent of a canal company, not party to this suit, taking water from Kern River, lower down than Goose Lake Slough. The conversation seems to have been between two parties representing canal companies, whose rights could not be in any manner affected by this suit, and was wholly irrelevant thereto.

XII.

All of the evidence in support of the claim of the defendant to the water of Kern River under its pretended compliance with the provisions of the Civil Code, was irrelevant, immaterial and redundant, so far as the rights of the plaintiffs were concerned.

By the very Act, under which the pretended notice of appropriation was posted and recorded, it is expressly provided that no rights of riparian owners shall be affected by any application made under its provisions.

§ 1422 Civil Code.

The sole purpose of offering evidence of the posting and recording of defendants' notice of appropriation was that their rights to the amount of water claimed in the notice of appropriation should relate back to the date of posting the notice; but it is only as between appropriators that the "first in time, is the first in right."

§ 1414, Civil Code;

And that the claim relates back to the time the notice was posted.

§§ 1418, 1419 Civil Code.

No right accrued as against the plaintiffs by reason of the taking of water from Kern River, until the defendant actually took the water from the channel, and then only to the extent of the amount actually appropriated, and not the amount claimed.

Bealey v. *Shaw*, 6 East., 208;
Sherwood v. *Burr*, 4 Day, 244;
Brown v. *Best*, 1 Wils., 174;
Baldwin v. *Calkins*, 10 Wend., 167;
Brooks v. *Curtis*, 4 Lans., 283.

All the objections we have made to the introduction of evidence relating to the canal companies, apply to the evidence relating to the posting and recording of the pretended notice of appropriation by Baxter and al., grantors of the defendant.

The execution of the notice was not proven.

All the evidence of the witnesses who saw it when posted in 1876, as to its contents, was erroneously admitted. Not one of them saw it more than once, nor could a single witness testify that what purported to be a copy was a true copy. There was no proof that it was recorded within ten days after it was posted. The notice was never duly recorded. It appears on the face of the recorded copy that it never was signed by the pretended locators, all of the signatures being in one handwriting.

The affidavit of O. P. Calloway attached to the pretended notice of appropriation, was improperly admitted in evidence, and also the record of such affidavit.

The evidence of the witnesses, Carr and James, as to the cost of the canals of the defendant, was irrelevant.

James testified that on Friday, May 20, 1881 (two years after this action was commenced), the canal had

cost $102,000. He knew nothing about the cost of that portion of the canal constructed prior to May 1, 1879. (Trans., Vol. 4, fols. 886–7.)

So it was error to permit James to testify as to the production of crops on land irrigated from the defendants' canal, and what the effect would be upon such crops if no more water was put on the land. (Vol. 4, fols. 884–5.)

We do not think the fact that Haggin & Carr are using all of the water of Kern River to secure title to a large tract of desert land is any defence to an action for taking water from Kern River that has run through the lands of plaintiffs from time immemorial, and made it swamp and overflowed land, and which land would, if the water be diverted by Haggin & Carr, become desert.

Solomon Jewett testified that such had been the effect when the water was turned away from any body of swamp land, and that it would be the same if the water was turned from the swamp land along Buena Vista Slough. (Vol. 2, fols. 269–271.) And C. W. Clarke testified that if the water was taken from the land for two years, it would become "desert land," like that along the Calloway Canal. (Vol. 2, fol. 1181.)

The question to be decided in this case is, Does the defendant divert water from Kern River which, if permitted to run down its channel, would run through the land of plaintiffs? and not as to who can or does make the best use of the water of the river.

XIII.

It was error to admit in evidence the report of N. R. Wilkinson and Wm. McFarland to the Board of Supervisors of Kern County. (Vol. 3, folio 330.)

Or,

It was error to permit defendant to withdraw such report after it had been received and read in evidence. (Vol. 3, folio 342.)

XIV.

It was error to admit in evidence the copy of record of observations made at the United States Signal Station at Visalia.

a. It appeared that Visalia was distant upwards of ninety miles from Kern and Buena Vista Lakes, and no calculation as to amount of evaporation that would take place on said lakes could be made with any degree of certainty from observations made at so distant a point.

b. The whole of the record introduced in evidence was not kept by the witness and that portion kept by other persons, of the correctness of which the witness could and did know nothing, should not have been admitted in evidence. The persons who took the observations, not taken by the witness Cochrane, was not an officer employed for that purpose, but a private person employed by the witness for his convenience. He had no deputy, nor was he by law authorized to have one. (Vol. 3, folio 1402, 1404, 1426–7–8.)

The witness was not able to testify to which particular portion of the record he did keep, and what portion was kept by other parties. (Vol. 3, folio 1409.)

XV.

And it was error to admit in evidence the copy of record kept by the witness, J. A. Sampson, and others at Sumner, for the reasons given in our first objection made above to the relevancy of the Signal Office Records. (Vol. 4, folio 1268.)

Sumner is twenty miles from Kern and Buena Vista Lakes, and a record of rainfall, or the readings of the thermometer at so distant a point could not be made the basis of a calculation as to the amount of rainfall or of the temperature at Kern or Buena Vista Lakes.

XVI.

The plaintiff also moved to strike out the testimony of Colonel Mendell and Mr. Schuyler as to the amount of annual evaporation from Kern and Buena Vista Lakes, and based upon the observations made at Visalia. The motion was denied. (Vol. 4, fol. 1676-7.) This was error, for the reason given above. The observations were made only in part by Mr. Cochrane, and the correctness of those made by other persons was not established.

XVII.

And in this connection we call attention to the next ruling of the Court (Vol. 4, fol. 1667), in refusing to strike out the calculation made by Colonel Mendell as to the amount of evaporation from such lakes, based upon his general knowledge of the subject of evaporation and of the locality.

The witness himself stated that he could not make such statements to a moral certainty in reference to them. The law does not require such proof as produces absolute certainty. But moral certainty is required.

Sec. 1826, C. C. P.

Evidence which produces moral certainty will alone justify a verdict.

Sec. 1835, C. C. P.

The data upon which Colonel Mendell and Mr. Schuyler made their calculations in relation to evaporation should have been stricken out. The defendant failed to prove the correctness of such data. (Vol. 4, fol. 1678.)

The Court also erred in permitting the witness Schuyler to testify as to the annual evaporation from Kern and Buena Vista lakes. (Vol. 3, fol. 1060.) The evidence was immaterial and irrelevant.

XVII.

It was error to permit the witness, H. A. Reading, to answer the question:

"Q—Mr. Reading, through that portion of this "swamp and overflowed land through which you "went, was there or was there not a continuous chan- "nel?" (Vol. 4, fol. 644–6.)

The witness had only crossed the slough at a few points, had not attempted to follow or trail it, and he was not qualified to testify as to whether there was a continuous slough or not.

And this error was repeated in permitting the witness, J. D. Schuyler, to answer a similar question. (Vol. 4, fol. 840.)

XIX.

The same witness, H. A. Reading, was permitted to testify as to the quality of the land along Buena Vista Slough against our objection that he had not shown himself to be an expert. He had never examined the land except at a few points on the extreme southern end of the tract, still he is permitted to testify as to the quality of the whole body of land along Buena Vista Slough, 50 miles and upwards. This was clearly error.

XX.

It was error to admit in evidence the deed from J. B. Haggin to the defendant, the Kern River Land and Canal Company, dated June 16, 1880, for the land on Kern River, at the point where the canal of the company took its water from said river. No title to the land was shown to be in Haggin at the time the deed was offered, or at any time during the trial. (Vol. 4, fol. 1608.)

XXI.

It was error to permit the witness, W. B. Carr, to testify to a conversation he had with O. P. Calloway, in July, 1875, as to the construction of the canal of the company. (Vol. 4, fol. 1654.)

a. It was hearsay testimony.

b. It was not admissible under § 1849, C. C. P., or Sub. 2 or 4 of § 1870, C. C. P.

The defendant claimed title under Calloway, not adverse to him, and the declarations of a grantor are only admissible in evidence *against* the interest of one claiming under him, not in his favor.

This brings us down to plaintiff's evidence offered in rebuttal.

The plaintiffs, in making their case in chief, called numerous witnesses, who testified that Kern River emptied its waters into Buena Vista Slough, and that the waters of the river then continued on in said slough and emptied into Tulare Lake, and that Buena Vista Slough was a continuous channel or water course from the point where it received the waters of Kern River to Tulare Lake.

Several of plaintiffs' witnesses claimed to have followed the slough its whole length, and at all stages of water, and it clearly appeared by surveys made by engineers employed by both plaintiffs and defendant, that such slough ran through the lands of plaintiffs that were described in the amended complaint.

To meet this testimony, defendant offered evidence tending to break the continuity of Buena Vista Slough as a water channel.

Two classes of testimony were offered for this purpose:

1st. That of witnesses who testified to having crossed the lands in the amended complaint described at different points, and that at such points, or some of them, they found no defined channel.

2d. The testimony of certain surveyors who testified:

a. That they had made a meander survey of the slough from where it received the waters of Kern River down so far as they could find any defined slough or channel (Sec. 24, T. 29 S., R. 23 E.) A map or plat of this meander survey was offered in evidence by defendant, showing a continuous slough or channel down to said Section 24. (Defendant's Exhibit I.)

b. A profile of a line ran by defendants' surveyors across the body of land described in the amended complaint, at a point about fifteen miles in a direct line northwest from where Buena Vista Slough received the waters of Kern River, and two and a half miles from where the surveys of defendant's surveyors, as delineated on Exhibit I, showed that the slough, as a definite channel, terminated, and the very full explanatory evidence and notes of the surveyors who ran such lines, and of their assistants, and their testimony tended to show

that there was no defined channel crossing the line run by them across the body of swamp land at such point.

None of the witnesses of defendant claimed to have followed the slough its entire length from where Kern River emptied into Tulare Lake, nor had they ever attempted to do so.

The whole of defendants' testimony was directed to a few points along the fifty miles of channel sought to be shown by plaintiff to run through their lands, and an effort made to show that at such points there was no well-defined slough or channel.

After the surveyors employed by the defendant had testified to the running of a line across the body of land in the amended complaint described, and at a point between the points where our witnesses in chief had testified there was a continuous channel, and after no less than three profiles of such survey had been put in evidence purporting to show the natural depressions and elevations of the land, and after four witnesses had testified fully as to what they saw and found in the form of a slough or water channel along this line and in making this survey. (In running this line across the body of swamp land, it had been necessary for defendant's surveyors to use a drag to break down the tules, leaving a well defined roadway the whole distance across the body of swamp land.) *This survey was made on April 28th, the day plaintiffs ceased their case in chief.* (Vol. 4, fol. 261.) After this was all done, the plaintiff placed four surveyors with assistants on this drag-line, and had them run a double line of levels its whole length, and over the same line run by the defendant's surveyors, and represented on the profiles offered in evidence by defendant. From the surveys made by these four surveyors, and levels taken, they made profiles showing all depressions and elevations

found by them in running the two lines (about 3 feet apart).

In rebuttal, the plaintiff called as witnesses the surveyors who had run these two lines and made the profiles, to prove that crossing such line there was not only a well defined channel, but several of them.

None of the surveyors who assisted in making this survey or running this line for plaintiff were permitted to testify.

a. To the nature of the country through which the line surveyed by them and by defendant's surveyors ran. (Vol. 5, fol. 8).

b. As to whether it was usual for surveyors in running such level lines and making profiles thereof to express on the profile a slough or water course, if one was found. (Vol. 5, fol. 13.)

c. To explain or state the object of taking and marking "plus" stations. (Vol. 5, fol. 31.)

d. Whether in running the level lines they came to or crossed any water. (Vol. 5, fol. 32.)

e. Whether they came to a pond, in running such line, and if so, the distance and course around it. (Vol. 5, fol. 33-35.)

f. Plaintiff's were not permitted to introduce in evidence the profile of the level line run by the four surveyors, upon which they had placed the word "slough," at points where they claimed to have found sloughs in running the line. (Vol. 5, fol. 41.)

g. The witnesses were not permitted to use the notes made by them at the time they made their survey to refresh their memory, and to show the physical features noted by them opposite certain stations. (Vol. 5, fol. 43.)

h. They were not permitted to testify that they found both an outlet and an inlet to a pond that they found along the line of levels. (Vol. 5, fol. 44.)

i. They were not permitted to show by such surveyors that in running such levels at the depressions marked on the profile (Exhibit 41) they found well-defined channels, and that they followed them north and south, and that they did not run out. (Vol. 5, fol. 93.)

j. One of the surveyors did testify that he found a slough between Station 131 and 132. The answer was stricken out without any ground of objection being given. (Vol. 5, fol. 137.) And the witness was not permitted to testify as to the nature of the banks of the slough where the level line crossed it, and that he followed it both ways and found a continuous channel. (Vol. 5, fol. 141.)

k. One witness, Este, was not permitted to testify as to whether or not he saw any sloughs or channels in assisting the plaintiffs' surveyors to run their level line. (Vol. 5, fol. 184.)

The Court erred in making each and every of such rulings.

The plaintiffs should have been permitted to have shown that the testimony of the defendants' surveyors who run the level line was false. They should have been permitted to have given in evidence in detail the result of the survey made by their surveyors on the same line that defendants' surveyors had run.

The surveyors of defendants testified that they ran this level line and made stations every 100 feet, and gave the elevations at those stations in fractions of hundredths of an inch, and presented a plat showing at just what points depressions and elevations came in running that line, and particularly where they found

what they styled a "pond." This "pond" Fillebrown located at a point between 11,400 feet and 11,500 feet from this starting point (Vol. 4, fols. 274 to 281); so exact were they in running this line.

On cross-examination we showed that they took no measurements in running this line, except by a wagon wheel, the size of which they did not know, and the steps of a witness, who testified that he could step off four miles over a rough, uneven country and not err more than 20 steps as to the distance (Vol. 4, fols. 1285–9); and this same witness, MacMurdo, placed the "pond" not only on the profiles, but on a diagram (Exhibit 39) that plaintiffs put in evidence, at a point between Stations Nos. 124 and 125, or between 12,400 and 12,500 feet from the starting point (Vol. 4, fols. 1109 and 1137), 1000 feet from where it is located by Fillebrown.

The plaintiffs' surveyors testified that they ran two lines, starting from the same point, with a surveyor's chain (and it is in evidence as an exhibit—"Exhibit 100.")

We desired that they should be permitted to describe a depression they found some 1700 feet distant from where defendants' witness, Fillebrown, testified he had found this "pond," and 700 feet from where MacMurdo had located it, and to show that it was not a "pond," but a water channel, and continuous for miles.

Defendants' witnesses had described this pond, which they claimed to have found—Fillebrown at Station No. 114, and MacMurdo at 124—giving the character of the east and west banks. The plaintiffs desired to have their surveyors describe the depression they found between Stations 131 and 132, to show that it was the same depression, and thus show that the survey of defendants was not correct, or in any manner to be relied upon.

It was clearly error to refuse to permit us to do this. The evidence was admissible to show the errors in the survey of defendants' surveyors, to impeach it, and also to impeach the witnesses. To show that McMurdo was out of practice when he stepped this four miles, and that he was out of his reckoning more than twenty steps. And it was admissible also to show that on this line there was a water channel and not a pond, and that the channel continued both north and south.

We had by our evidence in chief established a continuous channel from Buena Vista Lake to Tulare Lake. The defendants attempted to break this line at given points. It was evidence strictly in rebuttal to show that no such breaks could be found at the points attacked.

If the side or explanatory notes of defendants' surveyors were admissible in evidence to show no channel, the side notes of plaintiffs' surveyors were admissible in support of plaintiffs' theory that there was a continuous channel.

We could not anticipate at just what point along a slough, fifty miles in length, defendant would attempt to show it did not exist, nor was it necessary for us to do so.

Plaintiffs' witnesses testified to a continuous water channel, that would carry water from Buena Vista to Tulare Lake. The defendants attempted to break its continuity, not by showing that the slough had been followed, or attempted to be followed, from either end, but by attempting to show that at some half dozen places within that fifty miles, for the width of a buggy, there was no channel.

Plaintiffs' witnesses trailed these buggy tracks, and should have been permitted to testify what they found.

We were not even permitted to examine the witness, Este, who acted as a guide for the defendant's witnesses in making some of these crossings, as to what he saw on these trips, or as to whether he, in guiding them across the body of swamp land, led them across any channels. We could hardly have been expected to put this witness on the stand when making our case in chief, as we did not hear of his acting as a guide until we drew it out of one of defendants' witnesses on cross-examination. (Vol. 3, fol. 378.)

In this connection we complain of another error, in refusing to permit the surveyors employed by plaintiffs to testify as to a survey or cross-section that they made of Buena Vista Slough, at the point where it is crossed by the De Webber road. (Vol. 5, fol. 110, 122 and 142.)

In our case in chief we introduced witnesses to show that the slough had been surveyed and located down as far as Section 24, T. 29 S., R. 23 E., and that for all that distance there was a well defined channel, and a map of this meander survey was put in evidence, showing the line of the survey the whole distance. On one of the maps offered in evidence the De Webber road was traced.

Defendants, to break the continuity of the slough at the point where it was crossed by the De Webber road, called as a witness Vandorn Stoner, who testified that he drew hay across the body of swamp land over the De Webber road in 1877, and that in making the crossing he did not cross a channel, but had a good road all the way. (Vol. 3, fol. 841–3.)

Also J. S. Ellis, who testified that he hauled hay across the swamp land, over the De Webber road, and that he did not see any slough—had a good road. That there was no depression where a loaded team had any difficulty in drawing through. (Vol. 3, fol. 888 to 895.) Mr. Ellis, it is true, shows that he knows very little about the matter; he sees channels, and then he does not see them.

But this was the only evidence of defendant directed particularly to this De Webber road crossing. It is true that all the other witnesses of defendant who testified as to the channel down to Sec. 24, stated generally that the channel was continuous to that point, and the engineers of defendant testified to having meandered it all the way down to Sec. 24, and produced a map showing the line of the slough as meandered by them, and placing it by the side of the map of plaintiffs' engineers, the position of the channel is found to be the same for a distance of over 16 miles.

To show the view of the Judge of the lower Court as to what the testimony had been on this point, we copy from the Transcript (Vol. 5, folios 107 to 111):

"Mr. HOUGHTON. What we offer to show by this "witness is, that he, with Mr. Smith, the last witness, "made a cross-section of this De Webber road at "Buena Vista Slough, at a point where the De Web- "ber road crosses it, near the place where the old "pump was. Certain witnesses of defendant testify as "to just what that slough was at that point where that "road crosses. We offer to show by this witness that he "cross-sectioned that slough at that point, and what "the result of that cross-section was.

"Mr. GARBER. From the instruments?

"Mr. HOUGHTON. Yes, sir; certainly.

"Mr. FLOURNOY. We object to that. It is merely "a contradiction of our testimony; of a contradiction "of theirs.

"The COURT. There was a number of witnesses "who testified positively as to there being a slough "there. I think there were more witnesses on the "part of the plaintiff testified that there was a slough "there than testified that there was not a slough there.

"By Mr. MCALLISTER. Q—What kind of a survey "did you make there?

"A—We took elevations and levels across the chan- "nel at that point, and took the width and depth of "the water.

"Mr. FLOURNOY. The testimony offered is merely "cumulative.

"The COURT. I think the testimony of defendants' "witnesses, all of them, upon that point, was not uni- "form, and that the testimony of plaintiffs' witnesses "was, that there is a slough down there. It appears "to me it is just simply cumulative testimony.

"Mr. HOUGHTON. We make the offer.

"The COURT. I will sustain the objection.

"(Plaintiffs except.)

"Mr. HOUGHTON. And I understand that without "recalling Mr. Smith we can make the same offer to "prove the same fact by him?

"The COURT. Yes, sir; and the same ruling and ex- "ception."

It will be seen that this evidence was objected to only on the ground that it was cumulative, and the ruling of the Court was that it was not admissible, being "just simply cumulative testimony." (Vol. 5, fol. 110.)

That the Court may stop the production of evidence on a particular point we do not question, but it can only be done when the evidence upon that point is so full as to preclude reasonable doubt.

§ 2044, C. C. P.

When this evidence was offered and ruled out the Court seems to have had the provisions of this section of the Code in mind, and have had no reasonable doubt as to the sufficiency of the evidence to prove the existence of such a "slough" as plaintiffs' witnesses had testified to. No further evidence was offered on this point. Still we find the findings to the effect that there was no slough at this point.

When offering the evidence we are told that we have already established the fact, and further evidence is ruled out as cumulative, and then a finding is made against us, or to the effect that there is no slough at this point.

Est of Pacheco, 23 Cal. 481
Thompson v McKay 41 11 221

Plaintiffs made a *prima facie* case when they had introduced evidence to show the existence of a channel—

(1) In general, all the way.

(2) At given points along the line, say every mile.

When they had shown generally the existence of a channel through their land, their case is made out till attacked. Defendant may show, of course, that at given points there is no channel; but plaintiffs cannot anticipate where these points will be. When such attack is made it will be time enough to meet them.

And this seems to have been recognized as sound, though we find but one case in point, where plaintiffs gave testimony relating to an immense territory, as to particular points of which defendant introduced evidence inconsistent with the general theory of plaintiff. The case we refer to was that of

Rowe v. *Brenton*, 3 Mann. & Ryl., 133.

That was an action brought to recover damages for copper ore converted. Plaintiff showed in a very general way a *prima facie* case of title or possession of the

property whence the ore was taken. A motion for nonsuit was denied. The evidence was voluminous, and the trial took seven days before the full Court of King's Bench. When the plaintiff rested, the defence gave notice that he "must put in all his evidence of "property before he closed his case, and in reply "could only be heard to contradict the defendant's "witnesses as to particular facts."

And Bailey, J., said: "Where evidence is given on "a particular point, you give the whole of your evi- "dence on that particular point."

Then the defendant put in his evidence, and (as near as can be made out) said nothing as to a particular place called Holmbush. Plaintiff then, by testimony (probably) showed that he had some right to take ore from Holmbush, which was distinct from the place where plaintiff's principal claim lay. The defence then said: "They (plaintiff's counsel) pretended to say "Holmbush was a part where we had no right to take "copper. We now put in evidence to show defend- "ant's right to take ore there."

Brougham (for plaintiff) then said: "They might "have given this evidence in the first instance."

Lord Tenterden replied: "How could they tell that "you would give any specific evidence against Holm- "bush? They meet it now."

Rowe v. *Brenton*, 3 Mann. & Ryl., 133.

In Vermont the rule is this:

"The plaintiff is entitled to rest on making a *prima* "*facie* case. The defendant is then to introduce all "his evidence in answer to plaintiff's claim. The "plaintiff is then allowed to introduce testimony to "rebut the evidence given by defendant, and also ad- "ditional evidence in support of his case as made in "the opening."

Kent v. *Lincoln*, 32 Vt., 598.

So in Iowa (where there seems to be a statute limiting the number of witnesses who may be called to any given point), it was held that when plaintiff's *prima facie* case was in danger from the number of witnesses called by defendant, he might call further witnesses to corroborate those whom he examined at first.

Davidson v. *Overhulser*, 3 Greene (Iowa), 196;
Lawson v. *Campbell*, 4 Greene (Iowa), 414.

In Massachusetts this case came up:

Plaintiff offered a witness to prove the position of his wagon and carriage which had run into his wheel, and rested. Defendant brought two witnesses who swore to a very different state of facts, and who said they were both passing at the time in a wagon. Plaintiff then in rebuttal produced two witnesses whose evidence tended to show that neither of defendant's two witnesses were at the place at the time; and they also testified to other facts about the position of the vehicle, etc.

Judge Shaw said that the *alibi* part was strictly competent in rebuttal; that the other ought to have gone in with plaintiff's original case, but as it would not have been necessary if the defendant had not examined his two witnesses, and was pertinent in rebuttal, it was properly admitted.

Chadbourn v. *Franklin*, 5 Gray, 312.

In a case for negligent driving of defendant's carriage against the carriage of plaintiff, plaintiff gave in evidence that his carriage was run against at Layton, in Essex, by a carriage driven by defendant, and also called witnesses to show that defendant was in the neighborhood when the collision occurred. Defendant called witnesses to prove that he was not in Layton at the time, but in Richmond, and during the progress of plaintiff's case the plaintiff's witnesses were cross-

examined as to their being certain of the identity of defendant with the driver of the carriage.

Defendant having closed his case, plaintiff proposed to call other witnesses to disprove the defence, by showing that defendant was not at Richmond, but at Layton the time in question.

This was objected to as not competent; that plaintiff's attention had, by form of cross-examination of his witnesses, been directed to the importance of proving that the defendant was at Layton; that she should have exhausted that line of evidence, and reserved part of it to bring forward in reply.

Lord Denham, C. J., held the evidence admissible.

Briggs v. *Ainsworth*, 2 Moody & Rob., 168.

In Pennsylvania, in a case complicated with details, plaintiff was allowed to put in testimony in rebuttal against objection. The Court said: "It tended to "elucidate the matter in controversy, and as to its not "being strictly rebutting, that is of little consequence. "For in a case so mixed up with conflicting claims as "this, an important fact is sometimes omitted in its "proper order, or its usefulness not perceived, etc. "It could not have taken the other party by surprise."

Sample v. *Robb*, 16 Pa., 313, 320.

Moreover, defendants' evidence as to these particular points is in a certain sense new—it is not strictly and directly contradictory of plaintiffs' evidence. To contradict us he would show: (1st) generally that there was no channel from lake to lake; (2d) particularly at points where our witnesses stated they found a marked channel, there was no such channel in existence. But defendant selects other points as to which plaintiffs offered no testimony. New matter brought out by the defendant is strictly within the rule as subject to rebuttal.

This case arose in Massachusetts. Action of deceit, because defendants had swindled plaintiff into buying an interest in a patent machine. At the trial, plaintiff introduced evidence showing the thing to be worthless, and rested. Defendants produced a model of the machine, as to the correctness of which there was no conflicting evidence. Defendants' witnesses testified that a machine made on that model would work well. Plaintiff then called an expert, and asked him whether a machine made according to that model could be successfully used after a few trials. Excluded as not rebutting testimony.

Hoar, J., said: "This was a species of evidence "likely to make an impression upon their (the jury's) "mind. The plaintiff had opportunity to meet this "particular piece of evidence until the defendants "produced it. * * * * * It was not evidence "to support the issue in chief, because he denied the "correctness of the model; but it was evidence offered "and competent for the single purpose of impairing "the effect of a piece of testimony introduced by the "defendants."

Hayward v. *Draper*, 3 Allen, 552.

Wade v Thayer, 40 Cal. 583

In *Gilpin* v. *Consequa*, the action was on a contract to deliver teas of a certain quality on board ship at Canton. Breach that teas were of inferior quality. Evidence was given by plaintiff and defendant about the custom of the port as to an examination of the teas by the supercargo, and that he could, if he pleased, examine every chest, etc. Plaintiff asked to offer in evidence in rebuttal, to repel an *argument* which defendant would make, viz: that it was the duty of the supercargo to examine all the tea, and that it was to be presumed either that he had done so and was satisfied, or that having neglected to do so, defendant was not

liable. The evidence was admitted. The Court said that plaintiffs might offer evidence to "*repel any argu-* "*ment* to be drawn from the evidence given by the "defendant, that the plaintiff's supercargoes either "examined the teas and were satisfied, or that they "might have done so, and were therefore guilty of a "faulty negligence in not doing so."

Gilpin v. *Consequa*, 3 Wash., C. C., 188–189.

In a California case, plaintiff claimed title to water by appropriation in 1852, and continuous user to 1861, when defendant diverted it. Defendant claimed right by appropriation in 1853, and continuous use to the beginning of the action in 1862. Plaintiff introduced evidence tending to show his possession and user, etc.; defendant then introduced evidence tending to show a continuous and adverse user by himself. Held, that plaintiff had the right to show that defendant's enjoyment had not been continuous nor adverse.

Union W. Co v. *Crary*, 25 Cal., 509.

In this case defendant could not introduce evidence to show his own adverse and continuous possession, without contradicting plaintiff's testimony. Yet it need not be a direct contradiction. Plaintiff could have shown generally that he was in possession all the time for ten years, and defendant could then have picked out the last five years, and shown adverse and continuous possession in himself.

A case nearly in point, and strong in our favor, is—

Wade v. *Thayer*, 40 Cal., 584; also

Lisman v. *Early*, 15 Cal., 199.

In a Michigan case, plaintiff offered evidence tending to show negligence in a railroad engineer defendant had put in evidence, tending to show that the man was a good average engineer. Plaintiff, in rebuttal,

proved that the engineer had sometimes run by his stations.

"This would not have been admissible in chief," the Court says, "but was proper in rebuttal."

Detroit, etc., Co. v. *Van Steinberg*, 17 Mich., 111.

The objection that we make to the ruling of the Court in refusing to permit plaintiffs' witnesses to testify as to the condition of the land and channels, or the drag line where the surveyors ran the level lines, applies with greater force to the rulings of the Court, refusing to permit plaintiff to show by McCray and others that they had crossed the swamp land at every point, and on every line the defendant's witnesses had crossed, and what they found on such lines, and north and south of them, in the form of sloughs or channels.

Suppose this had been a suit in which the plaintiff had sued the defendant on a contract by which plaintiffs had agreed to construct a canal fifty miles long, and of a given width and depth, and on a given grade, from Buena Vista Lake to Tulare Lake, so as to carry water from one lake to the other, and the plaintiff had introduced witnesses who testified generally that the canal had been constructed in accordance with the provisions of the contract. The defendant, to defeat the suit, then put witnesses on the stand who testified that they had crossed the canal at six different points, and that at all of such points they found no sign of a channel or canal, and that at such points it would not carry water. Could not plaintiff, in rebuttal, call witnesses who had followed the footsteps of defendant's witnesses, and made a careful examination of the canal at the several points it had been crossed by them, and where they had testified there was no channel?

Or, suppose this suit was on a contract for the construction of a house, plaintiff alleging that the house had been completed in accordance with the provisions of the contract, and the defendant should deny generally that the house had been completed in accordance with the provisions of the contract.

Plaintiff should prove generally that all the provisions of the contract had been complied with.

Defendant should then call witnesses who should testify that they had measured the parlor, and instead of being thirty feet by forty feet, as specified in the contract it should be, it was only twenty-eight feet by thirty-eight feet.

Would any Court refuse to let four builders, who had measured the parlor, testify in rebuttal that they had each one measured the same room, and give its size?

The defendant calls witnesses who testify that at say ten or a dozen different points in that fifty miles, for the width of a buggy, or for more or less distance, there is no channel. Plaintiffs' attention is then for the first time called to the points where defendant claims this channel is broken, and although the evidence of plaintiffs that there is a channel for forty-nine miles out of the fifty stands uncontradicted, they cannot be permitted to meet this evidence of defendant, although, in the nature of things, it were impossible for plaintiffs to tell just what particular ten feet of the channel defendant would attack. And it appears that the defendant did not intend that plaintiffs should know what points on the channel would be attacked. All the surveys and examinations, except the single trip made by Jackson, Jastro, Taylor, and Barker, were made after plaintiffs closed their case in chief, and these trips were made April 14 and 15, after the trial of this case was commenced. (Vol. 3, fol. 623.)

The rule contended for by defendant would compel a plaintiff to prove in the first instance the size of the channel at every foot of the fifty miles' distance. In a suit on a contract for constructing a house, the plaintiff would have to prove the exact size of every single nail put in it, and by so many witnesses, that defendant could not possibly meet the evidence.

If the defendant wished to compel us to put in all our testimony as to the condition of this channel at any given point, they should have directed our attention to such point by their pleadings.

As the case stands, we allege that there is a water channel all the way from Buena Vista Lake to Tulare Lake, a distance of upwards of fifty miles; that it is a continuation of Kern River, and known by another name.

The defendant, in its answer, denies in general terms that there is a channel that carries the water of Kern River from where it empties into Buena Vista Slough to Tulare Lake.

We call witnesses and establish that there is just such a channel as alleged in the complaint to exist.

The error was again committed, in refusing to permit plaintiff to show by J. H. Huntley, John Beard, and F. P. McCray that they had been in a boat on Buena Vista Slough, from headquarters, on Section 15, T. 30 S., R. 24 E., down to the Bonestell House, and to show by them the width and depth of the slough, and particularly at the point where defendants claimed there was no well defined channel.

It will be noticed that the objection was made to these offers of plaintiffs' counsel only upon suggestion of the Court. (Vol. 5, fol. 141–153.)

McMurdo and Souther had testified that there were certain points on the slough, between Headquarters

and the Bonestell House, where it was not so well defined as at other points, and it was as to these special points that plaintiff desired to have these witnesses testify. (Vol. 5, fol. 158.) And again it is ruled out as cumulative by the Judge, before the counsel for defendant has an opportunity to object to it.

We copy from the Transcript. (Vol. 5, fol. 158–9, 160.)

"The COURT. Gentlemen, it seems to me, that this "thing is progressing rather far. In the first place, "as I have reiterated time and again, there has been "testimony, cumulative, introduced by the plaintiffs in "reference to those sloughs from Wible's Camp, in "fact, from Buena Vista Lake down to the north line "of Map No. 2. You are seeking to go into this "whole thing again, by this same witness, who tes-"tified fully in reference to it before, and by other "parties who testified before to having been in boats "down that slough. It is but re-opening the whole "case again. I see no end to it. I think the Court "has ruled sufficiently upon that.

"Mr. MCALLISTER. We are only trying to do this: "there were three points made by the other side; "the levels, the crossings, and the testimony of Mr. "McMurdo. We want to offer as to each of the three "points. There was no idea of making captious prop-"ositions at all. We just make the offer; it is ruled "out, and we except."

If any part of the facts we offered to prove are admissible, it was error to deny our motion.

Board of Education v. *Keenan*, 55 Cal., 648;
Coveny v. *Hale*, 49 Cal., 552.

Defendants placed witnesses on the stand who testified that they were on the land in suit, north of the

Tule House, and that all sign of a channel disappeared about three-fourths of a mile or one mile north of such house.

At the time defendants' witnesses visited that part of the land no water had reached the Tule House, and when plaintiffs' witnesses in chief were examined, the slough, for a long distance south of the Tule House, was dry. But before the plaintiffs called their witnesses in rebuttal the water had run down to a point some miles north of the Tule House, and the plaintiffs offered to prove by witnesses who had been on the slough north of the Tule House, after plaintiffs closed their case in chief, that they had found water running in a slough or channel three and a half or four miles north of the Tule House.

This is an error complained of by plaintiffs, who desired not only to show that there had been in years past a water channel through the lands of plaintiffs, but that this actually existed when the case was being tried, and was carrying water through the extreme north end of plaintiffs' land, and also to impeach the testimony of defendants' witnesses.

Again, suppose this had been a suit on a contract for constructing a canal between the two lakes, and defendant's witnesses had testified that they entered the canal at a given point, and followed it to its end, which was from five to ten miles from the point where the plaintiffs had contracted to finish it; that after reaching the end of the canal, they followed along the line where the canal should be constructed, and found no sign of a canal, and it should appear that this examination of the canal was made by defendant's witnesses after plaintiffs had closed their case; that after this testimony was given by defendant, plaintiffs should cause water to be turned into the canal and run the water its whole length, including the five or ten miles

where the defendant's witnesses had testified there was no sign of a channel or canal,—would any one claim that plaintiffs could not, by witnesses who turned in the water and followed it as it found its way along the canal, show that it ran freely to the end, and for the very five or ten miles where defendant's witnesses had testified there was no channel?

It was error to refuse to permit the witness Wible to testify as to the effect of the sand-flow upon the channel north of Headquarter's Camp.

A number of defendants' witnesses testified that Kern River carried a large quantity of sand; that it had completely filled the channel at certain points, particularly at the point where Kern River emptied into Buena Vista Slough.

And the Court questioned the witness McMurdo as to this sand-flow, and he was able to fix the exact point where the last grain of sand ceased to be carried by the water, and was deposited in the channel, and this point he fixes as about Sec. 23, T. 31 S., R. 24 E. (Vol. 4, fol. 1388–90 and 1403), or south of Headquarter's Camp. To rebut this evidence we sought to show by the witness Wible that this sand was carried below or north of Headquarter's Camp, and had in a measure filled the channel at certain points, and particularly where breaks had occurred in the canal.

This was in rebuttal of this testimony of McMurdo drawn out by questions put by the Court, and it was error to refuse to permit the witness to testify as to the effect of such sand-flow at points below where McMurdo had testified the channel was not affected by the flow of sand. (Vol. 5, fol. 200-2.)

Of the numerous attempts made by defendants to show that for the width of a buggy at particular points on Buena Vista Slough, there was no well defined channel, was that made by introducing the witnesses Thornton, McClung, McLean and Reading, and questioning them about their last attempt to cross this body of swamp land from a point near Will's Hog Camp.

This trip was made May 14th and 15th (Vol. 4, fol. 589). Plaintiffs closed their case April 28th, and defendant opened its case May 2 (Vol. 3, fol. 1). Therefore, the point of attack was not contemplated by defendant until 16 days after we had closed our case, and 12 days after defendant's case was opened.

Thornton testified (Vol. 4, fol. 601): "We stopped "at Will's Camp. Then we went to examine that "swamp land there, and we attempted to go into the "tules again *and it was so boggy * * * so we could "not go in with a team, and came back again and went "to the outside.*"

McClung testified (Vol. 4, fol. 441): "At Will's "Hog Camp we drove into the tules *and got bogged up "in the water, and we got out.*"

McLean testified that they tried to cross the swamp land at this point *and found it too boggy.* (Vol. 4, fol. 1523.)

ON CROSS-EXAMINATION.

"We drove in a short distance, *it was very boggy.*" (Vol. 4, fol. 1570.)

READING TESTIFIED.

"Q—Did you cross the whole body of the swamp "land there?

"A—No, sir; we went across that and then turned "out. *It got pretty boggy and we turned out east to the "high land.*" (Vol. 4, fol. 642.)

This witness says they did cross a slough at this point, going in and coming out, but like the other witnesses, he says they turned back because they found it boggy.

Not one of the witnesses say anything about having a guide to take them in and out.

After these four witnesses of defendant had testified that they had turned back from this trip *because they found it boggy* (the other parties who were along on that trip—Murray and Taylor—although both were called as witnesses and examined fully as to all other trips made by them across the swamp land, and were not questioned in relation to what they saw or why they returned without going all the way across the body of swamp land at this point), the plaintiffs placed on the stand as a witness Thomas N. Will, a boy 15 years old, son of the man from whom the hog camp was named (Vol. 5, fols. 207–9), who testified that he went into the body of swamp land near his father's house, acting as guide for the defend ant's witnesses.

After stating that he took Thornton, Taylor, McClung, McLean, Murray and Reading a mile or a mile and a half into the swamp, he was then asked: (Vol. 5, fol. 208–209.)

"Q—What made them turn back?

"A—They came to a slough—

"Mr. HAGGIN (interrupting). I object to that as "immaterial.

"Mr. FLOURNOY. I move to strike out the answer.

"The COURT. The motion is granted.

"(Plaintiffs except.)"

And on folios 215-16:

"Q—Did you in going out there with them cross any sloughs?

"Mr. HAGGIN. I object to any testimony of this "witness.

"By Mr. HOUGHTON (interrupting). Q—In going "out there did you take them across any sloughs?

"Mr. HAGGIN. We object.

"(Objection sustained; plaintiffs except.)"

The sole purpose of these six witnesses in making these several trips across the swamp land at different points, was to be able to testify as to whether or not there was or was not a channel at such points.

When examined as to this particular point all four of the witnesses who were examined said they returned because it was boggy, and three of them are silent as to whether before they turned to go back they crossed any slough or channel. They pretended to give to the Court a statement of all they found on that trip in the way of a water course.

In rebuttal the plaintiffs should have been permitted to show by the guide who took them in and out, that they not only crossed a slough, but that they turned back because they found another they did not dare to cross.

The objection to our showing that they turned back because they came to a slough, was that it was "*immaterial.*" As this case turned upon the single proposition, whether there was or was there not a slough or water channel through plaintiffs' land, we hardly think the evidence was *immaterial.* And if four of defendant's witnesses, having testified that they turned back because it was boggy, we should have been permitted to prove that they turned back because they found an impassable slough, and thus discredit their testimony, not only on that point but their whole testimony, for had it appeared that the witnesses' testimony was false in one part his whole testimony is to be distrusted.

Sec. 2061, Sub. 3, C. C. P.

The objection to our showing that sloughs were crossed before they turned to go out was certainly broad enough:

"Mr. HAGGIN. I object to any testimony of this "witness.

"Mr. GARBER. We object."

But its form can hardly be commended; in fact, it was no objection at all.

A general objection to testimony should be disregarded. The grounds of an objection should be specified and fully pointed out.

Leet v. *Wilson*, 24 Cal., 402;
Owen v. *Frink*, 24 Cal., 177;
Thompson v. *Thornton*, 50 Cal., 145;
Bd. of Education v. *Keenan*, 55 Cal., 645.

The motion to strike out the answer ot the witness, "They came to a slough," was still more general, and should not have been granted.

A general objection to the admissibility of evidence is insufficient.

People v. *Apple*, 7 Cal., 289;
Kiler v. *Kimball*, 10 Cal., 268;
Martin v. *Travers*, 12 Cal., 245.

"When a motion is made to strike out testimony, "the moving party should specify his objections to the "testimony with like particularity as is required in "pointing out an objection to a question."

Henry v. *S. P. R. R. Co.*, 50 Cal., 181.

The answer being responsive to the questions, the counsel should have specified the points on which they rested their motion.

Sill v. *Reese*, 47 Cal., 341.

Sweet v Osborn, 25 Cal. 627
Dunham v Simmons, 3 Hill 609

This evidence having been erroneously ruled out, the judgment must be reversed.

"But whatever the rule may be upon this point, "when *improper* evidence has been *admitted*, not chang- "ing the result, it seems to be well settled that *the ex- "clusion of proper* evidence is ground of reversal. In "the case of *Arthurs and al.* v. *Hart*, the Supreme Court "of the United States says: 'The case of the refusal "'of proper evidence on the trial is subject to very "'different considerations from those applicable to "'the improper admission of it. The exclusion of "'the evidence might change the legal features of the "'cause, and lead to a determination of it upon prin- "'ciples wholly inapplicable, in case the evidence "'has been admitted. * * * We think, therefore, "'that the improper rejection of testimony on the "'trial before the Judge, where the jury had been "'dispensed with, should constitute the subject of "'review on the writ of error, as in the case of a trial "'before a jury.' (See 17 How., U. S., 6.)

"The rejection of the evidence of the witness "Serda was error, for which the judgment must be "reversed."

Estate of Toomes, 54 Cal., 516–17.

In such a case injury will be presumed from error where it cannot be seen from the record that none has been done.

Spanagel v. *Dellinger*, 38 Cal., 278.

Approved in

Sweeney v. *Riley*, 42 Cal., 402.

The defendant attempted to show that the amount of water taken by it was not sufficient in quantity to affect the flow to plaintiffs' lands, and the Seventy-Sixth Finding is to that effect.

The defendants also called numerous witnesses to prove the amount of evaporation that took place an

nually from Kern and Buena Vista Lakes, claiming that none of the waters that ran down into the lakes would ever reach plaintiffs' lands, by reason of such evaporation. The defendants even had witnesses fix the amount of water lost by evaporation in cubic feet.

The plaintiffs in rebuttal called two witnesses, Nellie A. Barker and Lottie Barker, and offered to prove by them that they had during all the time between March 23, 1879, and June 1, 1881, kept a record of gauge readings of waters flowing in Kern River at the Rio Bravo Ranch, and above the canal of defendant; and then offered to prove by Mr. Schuyler, the Deputy State Engineer, that he had made a computation of the amount of water running in Kern River from such records kept by Nellie and Lottie Barker during the years 1879, 1880 and 1881, and what that amount was.

This evidence was objected on the ground that it was not in rebuttal of any facts proved by defendants. (Vol. 5, fol. 241-3 and 411) and the objection was sustained, to which ruling plaintiffs excepted.

This was clearly error.

Defendant having shown the amount of evaporation that would take place from Kern and Buena Vista Lakes into which they claimed all the water of Kern river ran, but admitted that plaintiff s' land would receive the benefit of any overflow from these lakes, it became material that we should show the volume of water that ran down Kern River into these lakes, and thus to show to the Court that the large evaporation claimed by defendant to take place from Kern and Buena Vista Lakes, would have little effect upon the volume of water flowing down Kern River, and to show further that the 600 cubic feet that defendants claimed it took from the river would materially diminish the volume or amount of water usually reaching Buena Vista Slough. (76th Finding.)

The only evidence in the case as to the volume of water flowing in Kern River was that of a witness of defendant, Col. Mendell, who testified that he estimated that in 1873 that there was 2500 cubic feet of water flowing in the river. (Vol. 3, fol. 1028.)

And all the witnesses who testify as to the flow of water in Kern River, for the different years, agree that there was not an unusual large flow of water in Kern River in 1873, but in that year, there was less than an average flow.

If we could have proven that this flow continued for 30 days, the immense evaporation testified to by Col. Mendell would have been more than overcome, leaving eleven months of flow still to run down to plaintiffs.

Col. Mendell also testified that he measured the flow of water at Pioneer Bridge, and where Kern River ran into Buena Vista Slough twice in April, 1881.

April 17. He found 555 cubic feet of water flowing. (Vol. 3, fol. 1017).

April 30. 1005 cubic feet. (Vol. 3, fol. 1018.)

Although these points were from 14 to 15 miles from each other in a straight line, and a greater distance if the river is followed, he found about the same quantity of water flowing at Pioneer Bridge that he did at Cole's Bridge. (Vol. 3, fol. 1027.)

The measurements were taken when the Calloway Canal was running bank full; a stream 80 feet wide and 3 feet 9 inches deep. (Vol. 2, fol. 279.)

Had we been permitted to prove by Schuyler how much water was flowing in Kern River, above the head of the Calloway Canal, on April 17th and 30th, we think Finding 76 would never have been in this case; or had it been, it would have been so clearly contrary to the evidence that this Court would readily have given us a new trial on that ground alone.

In this same connection, plaintiffs offered to prove by four witnesses—Judd, Garlick, Ober and Dixon—that at different times during 1879 a wing dam was thrown across Kern River at the head of the Calloway Canal, and that it threw all the water running in Kern River into the Calloway Canal, and that no water ran below.

The whole objection to the proof was "because they "have tried to establish that by the testimony of Mr. "Willow and others." (Vol. 5, fol. 245.)

[Another original manner of taking an objection, of which this case is so prolific.] And the Judge, in denying our motion, put it on the same ground, adding that defendants' witnesses admitted the construction of the wing dam to turn the water.

Yet again, notwithstanding we have proven the fact by our witnesses, and it is admitted by those of defendants, and for the reason no further evidence admitted, still the findings, strange to say, are all to the contrary. (Findings 76, 73 and 74.)

This was followed by an offer to prove by the witness John Morter that in July, 1880, he crossed the Calloway Canal and found it full and swimming, and that there was no water in the river at Pioneer Bridge, a few miles below; and the testimony shows that at that time the plaintiffs had no water in Buena Vista Slough.

This offer was objected to on the sole ground that the evidence was cumulative and ruled out. (Vol. 5, fol. 248.) And again, the findings are all the other way.

It was error to refuse to admit in evidence the certificates of purchase for the land described in the amended complaint, issued to the plaintiffs and their grantors.

The plaintiffs, in their amended complaint, allege

generally that they were at the commencement of the suit owners in fee and in possession of the lands described in such amended complaint, and that they and their grantors had been such owners for more than one year before the commencement of the suit, and that such lands were swamp and overflowed, and as such belonging to the State of California until 1876 and later, when they were granted to plaintiffs or their grantors. (Vol. 1, fol. 87–88.)

Defendant, in its answer, denied the ownership and possession of plaintiffs, and that the land was granted by the State to the plaintiffs or their grantors in 1876, or at any time.

Plaintiffs, in their case in chief, put in evidence patents from the State of California for all of the land described in the amended complaint, except some 7240 acres, and for that they put in evidence a decree in the case of *People* v. *Center*, dated September, 17, 1878, awarding such land to them.

They also put in evidence a deed from and executed by Thomas Baker, Julius Chester, Horatio P. Livermore, and John H. Redington, for some 14,000 acres of the land in the amended complaint described, dated May 28, 1870, and proved that they went into possession of the land under that deed, using the land from 1870, down to the trial of this case, for pasturing purposes, and cultivated some portions of it.

Under a special defence set up by defendant in its answer, counsel for defendant attempted to show that their rights to the water of Kern River were acquired before plaintiffs had any interest in the land in suit, and that plaintiffs took the land under their patents, and subject to the rights of defendant to appropriate the water from Kern River.

The plaintiffs, after defendant had attempted to establish the facts set up in its special defence, and to meet it, procured certified copies of all the certificates

of purchase issued by the Register of the State Land Office for the land in suit, together with certified copies of the assignments of such certificates to the plaintiffs, where deeds had not already been put in evidence from the persons to whom the certificates were issued, and after defendant had closed its case, offered them in evidence.

The Court refused to admit such certificates and assignments in evidence, on the ground that they were not proper testimony in rebuttal.

This evidence was clearly admissible in rebuttal.

The plaintiffs made their case by proving title to the land and possession at the time the suit was commenced, and that the Kern River ran through such land.

The defendant under a special and affirmative defence (Third Answer), attempted to show that their rights to the waters of Kern River, ante-dated plaintiffs.

While it was true that the legal title to this land remained in the State, until the patents were issued in 1876 and later, the State had held the land in trust for plaintiffs, for some six or eight years, and we should have been permitted to have put in evidence the certificates of purchase to prove such fact, and to prove that plaintiffs' rights to the waters of Kern River dated back, long anterior to any attempted appropriation by defendant, or its grantors.

Abbey, H. A., v. *Willard*, 48 Cal., 614.

Alhaust & W Co v Raynor 57 Cal 58.

I cases involving title to land the rule is this: If, after plaintiff has shown title in himself, defendant shows that he has an older title, plaintiff may then rebut by showing that he has still another title better than defendant's. This second title may be entirely different from the one he proved in making his *prima facie* case.

A curious instance of this kind occurred in New York.

Plaintiff's evidence was objected to as inadmissible at that stage of the trial, because as defendant insisted, plaintiff had introduced such proof in chief as he thought proper to show title, and ought to have put in all he meant to rely on, and could not be heard now to show a different state of facts. But the Court held the evidence was admissible in rebuttal.

Morris v. *Wadsworth*, 17 Wend., 108–118–119.

And in South Carolina, after plaintiff had shown a grant to himself, defendant proved an older grant; whereupon plaintiff showed adverse possession in himself long enough to bar defendant's rights. This was ruled out by the lower Court, as not good in rebuttal, but the appellate Court held the ruling erroneous, and reversed the judgment, saying:

"Anything may be given in rebuttal which is a "direct answer to that produced by the defendant. "If defendant put in a release, plaintiff may reply "forgery. * * * When a plaintiff has established "his case, he need offer no further evidence until some "evidence is offered on the other side to destroy or "impair it. Plaintiff could not know that the de-"fendant would rely on an older grant. * * * "And even if he had known it, would not have been "required, and perhaps not allowed, to impede the "business of the Court by giving evidence in an-"ticipation of testimony which might not be pro-"duced."

Scott v. *Woodward*, 2 McCord, 161.

In a case before Lord Denman, the plaintiff claimed possession as heir of one Thomas Gorley. He proved title and heirship. Defendant put in and proved a will of Thomas Gorley, executed in 1837. Plaintiff

offered in reply a will of 1838, by which the estate was demised to him. Objected to, inasmuch as that will formed a part of plaintiff's title, and ought to have been put in as a part of plaintiff's case in chief.

Lord Denman held the will to be admissible in evidence in rebuttal.

Doe v. *Gorley*, 2 Moody & Robinson, 243.

Admitting, for the sake of argument, that it rested in the discretion of the Judge of the Superior Court to let this evidence in, or rule it out; still, ruling it out was clearly an abuse of such discretion.

The evidence offered did not operate as a surprise to defendant. It is not claimed that the plaintiffs were guilty of any laches in not procuring certified copies of the certificates.

(It will be remembered that these certificates are required to be delivered to the Surveyor General, before a patent can be issued.)

§ 3519, Polit. Code.

And here, we have in the record, documentary evidence that would have compelled the Court to have decided this case in our favor, the Court refusing to consider it where it rests in the discretion of the Court to receive it or not.

If any Court can, after reading the Second Finding in this case, say it was not the grossest abuse of discretion to refuse to permit us to negative such finding, then we must admit that Courts are organized to try one side of a case, and not fully hear and determine a case after a full hearing given to both parties and *upon its merits.*

The Fifth and Sixth Answers, or defences set up by defendant was to the effect that plaintiffs were not injured by the fact that defendant took water from Kern

River, for the reason that other canal companies on the river were entitled to take all the water that ran in the river, and if the defendant did not appropriate it, the other canal companies would, and that the defendant had the consent of the other companies to take the water.

W. B. Carr, testified that Haggin & Carr owned and controlled the defendant canal, and had ever since 1875. (Vol. 2, fols. 2164-5.)

We should have been permitted to show by the witness, C. Brower, that they owned and controlled the other canals, that it was claimed had rights to the water of Kern River, and who assented to its being taken by the defendant canal.

We offered to prove by Brower, the Secretary of the companies, that Haggin & Carr owned and controlled the following canals, viz: Pioneer, Stine, Buena Vista, Kern Island Irrigating Canal, Farmers, Gates, James, Plunkett, James, Dixon and Joyce.

It would then have appeared that the real defendants in this case, Haggin & Carr, sought to establish their right to take the water from Kern River by showing that other canal companies owned and controlled by Haggin & Carr consented to their doing so, or by showing that if Haggin & Carr permitted the water to pass the headgate of the Calloway, that Haggin & Carr would take it out anyway in the Pioneer, Stine, and other canals built and owned by them. And here we incidentally call attention to the fact that, although two carefully drawn defences are employed to set up the rights of these companies, and over two hundred and fifty pages of this transcript devoted to proving up the rights of such companies, we have no findings as to whether they had any rights at all or not, and if so what they are; and notwithstanding the fact that when we moved to strike out the defence setting up the rights of such companies, the defend-

ants resisted the motion, and successfully, claiming the defences were good, and necessary to defendant to enable it to make a proper defence to this action, and notwithstanding the Court devotes some six or seven days to listening to evidence as to the rights of these canal companies to take water from Kern River, and that all the evidence went in under an objection of plaintiffs' counsel that it was irrelevant and immaterial.

It was error to refuse to strike out the defence and let in evidence in support of it; or if not error, then this case must be sent back for new trial for want of findings upon material issues.

The defendant devoted days to proving how many persons irrigated lands, and the number of acres irrigated from the several canals on Kern River. The witness, James, was examined fully on this point. (Vol. 4, pp. 225 to 241 and 245 to 250.) We call attention to the last question put to this witness on his examination on these points, and the evasive answer of the witness. (Vol. 4, fol. 1000–1.)

" There are a great many people other than Haggin
" & Carr cultivating land which is irrrigated by these
" several canals which I have described.
" Q—How many do you suppose there are ?
" A—I cannot state how many.
" Q—Approximately ?
" A—A great many people; *there must be* 300 *or* 400
" *different people depending upon those canals for irriga-*
" *tion.*"

It will be seen that the witness evades answering the question as to how many, not tenants of Haggin & Carr, depend upon these canals for irrigation—but says 300 or 400 different people *depend upon the canals for irrigation.*

The plaintiffs in rebuttal offered to prove by the witness, L. L. Dixon, who was employed as an assistant by the State Engineer to keep a record of irrigation from canals, and amount of land irrigated, just who did use water from the canals, and how much land was irrigated.

It was by the Act creating the office of State Engineer (Acts 1877–8, p. 635) and defining his duties, provided that he should get just such information in relation to irrigation as Mr. Dixon had carried into this book, and Schuyler, the Deputy State Engineer, testified that such information was obtained by Dixon under instructions from him. (Vol. 5, fol. 407–8.)

Sub. 14, Sec. 4, authorized the State Engineer to employ assistants; and we find the State Engineer in his report using this very information, giving in detail the ownership of land irrigated by the different canals, number of acres irrigated from the canals, and the number of landowners, independent of tenants of Haggin & Carr, who irrigated from the canals. (160.)

Page 114, Report State Engineer (1880).

This evidence was therefore admissible as a book kept by a person in public office, being particular facts inquired into and recorded for the benefit of the public.

1 Greenl. Ev., § 483–4.

The Court recognized this rule of evidence when defendant offered the records of the U. S. Signal Service Office kept in Visalia, and let such records in evidence, although a copy of a copy only was produced, and notwithstanding they were kept in part by parties not before the Court to testify to their correctness, and who were not employed as an assistant or deputy to keep such records.

The ruleing admitting in evidence the U. S. Signal

Office records must have been error if the ruling refusing to let in the Dixon records is correct. The Court cannot apply one rule to defendant's testimony and another to plaintiffs'.

The witness was not permitted to testify as to who used water from the canals and how much land was irrigated from them; nor were we permitted to put in evidence the record kept by him and required to be kept by him as a deputy of the State Engineer.

If it was material to any issue in this case for defendant to prove by James and a score of other witnesses what amount of land was cultivated and irrigated from the canals, and who the parties were dependent upon the canals for water, and their names and number, and it was so held to be when we objected to such evidence as irrelevant and immaterial (Vol. 4, fol. 914-15), then it surely was proper evidence in rebuttal for us to show that the evidence given by defendant's witnesses was not true; to show by other witnesses just what land was irrigated from the canals and by whom irrigated.

This we sought to do by calling as a witness L. L. Dixon, one of defendant's witnesses, and it will be seen by the statistics kept by Dixon as Deputy State Engineer (appearing on pp. 110-121 of Vol. 5) what the result would have been had the evidence been admitted.

James and other witnesses of defendant testified to the acreage irrigated from the different canals.

This record kept by Dixon and his testimony would have shown a less acreage irrigated than testified to by defendant's witnesses.

James testified that 300 or 400 persons irrigated from the canals, but does not say how many irrigated who were not Haggin & Carr's tenants. By putting in this record, defendant's counsel would have had that question pretty correctly answered.

This record, kept by Dixon, of the canals (23) gives the names of 196 irrigators only, and we only get that number by counting the same name when repeated in connection with the same canal or different canals.

The name of James B. Haggin appears no less than 28 times; McClung Ranch (Haggin) 4 times; Buena Vista Ranch (Haggin) 6 times; Poso Ranch (Haggin, 1679 acres); Livermore Ranch (Haggin, 4040 acres).

We find following tenants of Haggin: 19 on Calloway (all); 2 on Pioneer; leaving only 135 outside parties, and how many of those were tenants of Haggin we cannot say, but no doubt a goodly number of them were.

It also appears by such record that no one except Haggin irrigated from 4 of the canals; Jones & Tuckey, Dixon & James, Baker, Noble & Gates, and James, while the Dixon and Joice has but one other irrigator than Haggin with 100 acres, and Haggin 1000, and the Cotton Ranch canal, two other irrigators, with 390 acres to Haggin's 792 acres.

By the records which should have gone in evidence, it appears that all testimony of the witness James, as to the amount of land irrigated from the different canals testified to by him was false, and that he in no single case gave the correct acreage irrigated, and that he exaggerated the number of people irrigating from the canals.

Following is a tabulated record of Records kept by L. L. Dixon, showing number of acres of land irrigated from each canal, number irrigated by Haggin and his tenants, and number irrigated by other parties: (Vol. 5, p. 110 to 121.)

TABULATING THIS RECORD, WE HAVE:

NAMES OF CANALS.	Total Acreage Irrigated.	By Haggin.	By Others.
Beardsley	578	217	361
McCord	679¼	198¼	481
Calloway	8982	8982	.....
McCaffrey	454½	.....	454½
Emory	25	.....	25
Jones & Tuckey	20	20	.....
Railroad and Goose Lake	458	.....	458
Pioneer	3904½	2660	1244½
Johnson	461½	.....	461½
Dixon & Joice	1245	1074	171
Kern Valley Water Co	230	.....	230
Kern Island	10,018	5210	4808
South Fork	1096½	.....	1096½
Colton Ranch	1182	792	390
Farmers	2868¾	1043	1825¾
Fish & Able	566	.....	566
Baker & Noble	750	750	.....
Stine	6219½	5195	1024½
Buena Vista	3405	2120	1285
James	3034	3034	.....
Meacham	932	.....	932
Wilson	30	.....	30
Totals	47,139½	31,295¼	15,844¼

By this table it will be seen that only 47,139½ acres of land were irrigated from all the canals; of this 30,-275¼ acres (two-thirds) belonged to Haggin, and only 15,844¼ acres to parties who may or may not have been Haggin's tenants.

In brief, that when the defendant—owned and controlled by Haggin & Carr—was, as it claims, taking water from Kern River, with the consent of the other canal companies, it was simply an appropriation of all the water of Kern River by Haggin & Carr, and by such canals as they found it most to their interest to use from. See testimony of R. L. Dixon (Vol. 3, p. 565–6).

THE FINDINGS ARE NOT SUPPORTED BY THE EVIDENCE, BUT ARE CONTRARY THERETO.

I.

The evidence is insufficient to justify the second finding. It is not a case of conflict of evidence, but the finding is contrary to the evidence.

THE COURT FINDS:

a. That the plaintiffs had no right, title, interest, claim, demand or possession, legal or equitable, in or to any of the land in the three patents described, prior to the issuance of such patents to them.

b. That as to the lands adjudged and decreed to plaintiffs in the case of *People* v. *Center et al.*, they had no right, title, interest, claim, demand or possession, legal or equitable, prior to the filing of the decree in that case, September 17, 1878.

The only evidence to show title in plaintiff to the lands in suit was that offered by plaintiffs.

The defendant did not attempt to contradict plaintiffs' evidence on that point. We therefore only have to consider the evidence of plaintiffs on these points to see if a finding that plaintiffs had no right, title, interest or claim, legal or equitable, in the lands in suit is supported by the evidence.

We will first consider the evidence as to the land patented to the plaintiffs by the State of California.

By patent dated June 15, 1877, the State of California granted to plaintiffs 6160 acres of swamp and overflowed lands, being a portion of the land described in the amended complaint. (Vol. 2, fol. 50 to 59.)

The finding is that plaintiffs had no *right, title, interest, claim,* * * * *legal or equitable,* to such 6160 acres of land prior to June 15, 1877, the date of the patent.

The plaintiffs must have have had an equitable claim to this land for at least one year prior to the issuance of the patent. A patent cannot issue until one year after approval of the survey (§ 3521, Polit. Code); therefore the surveys must have been approved not later than June 15, 1876, and the first payment for the land must have been made within fifty days after approval, or on or before August 4, 1876. (§ 3112, Polit. Code.) The presumption would be that all requirements of the law had been complied with. But in this case we are not left to deal with presumptions; it is recited in the patent that all the requirements of the Acts of the State Legislature have been fully complied with. (Vol. 2, fol. 56.)

To fully comply with such statute, the applications of plaintiffs must have been approved on or prior to June 15, 1876, and payment made on or before August 4, 1876, and after that date the plaintiffs had a vested right in the land, the State holding the legal title in trust for them.

Bludworth v. *Lake*, 33 Cal., 256;
Manley v. *Howlett*, 53 Cal., 97.

The certificates of purchase to the land which they must have held for months is by statute made *prima facie evidence of title*, and ejectment may be maintained upon it.

Stanway v. *Rubio*, 51 Cal., 41.

The patent dated September 11, 1876, for 760 acres must have been issued at least one year after approval of survey also. It is recited in the patent that Miller & Lux are entitled to a patent for the land as assignees of Julius Chester (Vol. 2, fol. 44), and we have in evidence in this case the assignment of Julius Chester, in the form of a deed to Miller & Lux, dated and acknowledged May 28, 1870, conveying this very land to them.

So as early as 1870 the plaintiffs in this case had a claim to and interest in the land described in the patent of September 11, 1876.

The patent of February 17, 1876, relates back one year at least, or to February 17, 1875.

And the patent to plaintiffs for $29,188\frac{88}{100}$ acres of land, dated January 18, 1876, relates back to January 18, 1875, or prior to any attempt of defendant to appropriate waters from Kern River.

It therefore clearly appears that the second finding is contrary to all the evidence offered as to when plaintiffs first acquired any interest in or title to the land conveyed to them by the State patents.

Let us now examine the evidence and see when plaintiffs first acquired an interest, legal or equitable, in the land described in the decree, in *People* v. *Center*.

The finding (2) is that the plaintiffs had not, prior to the filing of the decree, September 17, 1878, any right, title, interest or claim, legal or equitable, in the land.

The decree in *People* v. *Center*, awarding to the plaintiffs 7240 acres of the land in the amended complaint described, was obtained under proceedings authorized and taken under the Act of the Legislature, approved March 20, 1878 (Acts 1877–8, p. 358), entitled "An Act to provide for determining the rights of parties in certain swamp and overflowed lands in Fresno and Kern counties."

To entitle parties to a decree awarding them land under that Act, they were required to appear in the case and file an answer within sixty days after the passage of that Act (May 19, 1878). They were required to allege and prove before they could procure such decree, that they were claimants under the par-

ties who held a State patent to land; that they had paid State and county taxes on the land claimed by them; that they had paid, including the amount paid as taxes, at least $1 per acre on the land claimed by them in fencing upon or enclosing the same, and other improvements for its benefit; all such payments to have been made subsequent to November 11, 1867. Upon making such proof and procuring decree, the title of the State should vest as of the date of the decree.

By the decree, which is in evidence (vol. 2, fol. 112) it appears that the plaintiffs did appear in the case of *People* v. *Center; that they had a direct deraignment of title from the grantees to the old State patent; that they paid full value for the land; that for many years last past they had by themselves and tenants been in the actual occupation thereof*; that they and their grantors had paid taxes on the land amounting to $1734.02; *that the plaintiffs had expended, since November* 11, 1867, *in reclaiming the land and for permanent improvements thereon, the sum of* $38,060, or more than $7.25 per acre outside of the amount paid for taxes.

Still, we have a finding that these plaintiffs, who have expended prior to May 19, 1878, the sum of nearly $40,000 on 7240 acres of land, had had no *right*, title, *interest*, claim to, demand *or* POSSESSION of it prior to September 17, 1878.

It is further found by the Court that plaintiffs had no *possession* of any of the land in the amended complaint described, prior to the issuance of the patents and date of decree in *People* v. *Center*.

Mr. Crocker testified to being in possession of the land, using it for grazing thousands of heads of cattle every year, from 1870 to the trial of this action.

He testified (vol. 2, fols. 488–9) that he had been on

the Slough all the time from 1871 to the present time, raising cattle and engaged in the stock business.

He then gives in detail the facts as to ranging his cattle each year from 1869 to date, all along Buena Vista Slough, from Buena Vista Lake to Tulare Lake.

"I was raising cattle on the Slough from 1872 to "1876. When I first went there, we estimated that "we had 1200 head of cattle. That was in 1869. I "could not tell how many I had in 1876. I had bought "a great many and raised a great many. * * We "might have had 10,000, or might have had 15,000; I "could not tell. I think we had at least 10,000. We "had about the same number during the years 1873, "1874 and 1875.

"Q—Were you running those cattle on this land in "suit?

"A—Not all of them, but the greater portion of "them.

"In working that swamp with my cattle, from 1869 "to 1876, I was all through it, on every acre, from one "end to the other."

Trans., vol. 2, fols. 492–494.

We bought the land in 1870, and went into possession. The next year, 1871, was a dry season. (Vol. 2, fols. 714–15.)

"Q—When did you commence pasturing your cattle "upon the land described in the amended complaint?

"A—In 1870; at the time we bought the land "and came in possession of it." (Vol. 2, fols. 2382–3.)

F. M. Epperly testifies (vol. 2, fol. 2254), that he rented land on Buena Vista Slough from Crocker, from May, 1871, to May, 1876, and used it for running hogs on, and paid the rent in part by looking after his, Crocker's stock.

Not only did the defendant fail to contradict this evidence as to the possession of the plaintiffs, but they called witnesses to prove the fact of Miller, Lux & Crocker having cattle all along Buena Vista Slough.

Wm. McFarland (vol. 4, fol. 1472) testified—in speaking when he saw the cattle of plaintiffs in the spring of 1875, says:

"I saw the cattle all down Buena Vista Slough, or "the swamp. I mean the Swamp Land District down "there."

(And fol. 1477): "I have seen them down the "swamp land, all along as far as Epperly's Hog "Camp. * * I have seen them in early times. * * "As a general thing, when you go down the Slough "here, across the Slough at Tracy's Crossing, you "would probably meet a few of the cattle away down; "sometimes it would be a big band, and sometimes "only a few. * * I have seen Crocker's vaqueros "along there, rodeoing. They had the same prepara- "tions in the way of a camp that any rodeoing party "would have; had the outfit along with them."

With a deed dated May 28, 1870, conveying 14,000 acres of the land in suit to Messrs. Miller and Lux in evidence, and the evidence of at least a dozen witnesses, and some of them witnesses for defendant, that the plaintiffs were running cattle over the land and using it for grazing thousands of head of stock, and no attempt made to attack either the title or possession of the plaintiffs, we still have a finding *that the plaintiffs had no right, title, interest, claim, demand or possession to any of the land in suit, prior to* 1876.

If counsel for defendant can find any evidence in support of this finding, we hope it may be pointed out.

The 80th finding has no evidence to support it.

We should be pleased to have counsel refer us to any testimony in the case, showing that the plaintiffs have used the land in any different manner since they received their patents for it, than they did for the five or six years prior to the issuance of such patents.

The piaintiffs entered into possession of the land when they purchased it in 1870, and there has been no change as regards the manner in which it has been used or uses to which it has been put, since that time, except in the matter of cultivating some small portions of the land during the past few years.

The proof that plaintiffs had actual possession of the land, is *prima facie* evidence of title.

Kelly v. *Mack*, 49 Cal., 524.

CCR 21963 Sub 11+12

Mr. Crocker testified that the land was purchased by plaintiffs for partnership purposes, and that they were induced to purchase it because it was well supplied with water, and gave them good pasturage for the stock in dry years, when the feed on other lands failed.

II.

The third finding in this case is not sustained by the evidence in so far as it finds that the lands of plaintiffs, north of Section 24, *T.* 29 *S.*, *R.* 23 *E.*, *are not situated along Buena Vista Slough. It, by reference, makes three other findings a part of it,* 18, 71 *and* 72. *All four of these findings are contrary to the evidence, and they are also contradictory. By the third finding it is found:*

1st. "That the lands of plaintiffs do not nor do "any part thereof border on Buena Vista Slough."

This finding of fact is contrary to all the evidence offered in this case.

2d. "That none of said land is situated along "Buena Vista Slough, except as set forth in findings "18, 71 and 72."

The 18th, 71st and 72d findings contain no exceptions.

The finding of fact is not only contrary to all the evidence offered in this case, but it is contradictory of the next fact found in this third finding, *i. e.*: "The channel of said slough is traceable through the west half of Section 10 and the northwest quarter of Section 5, Township 30 South, Range 24 East, and as far north as Section 24, in Township 29 South, Range 23 East."

Both pieces of land above described are lands of plaintiffs, and described in the amended complaint. (Vol. 1, fol. 125.)

It clearly appears by the testimony offered by both plaintiffs and defendant that there is a well defined channel down as far as Section 24, Township 29 South, Range 23 East. There is no conflict in the testimony as to the fact that the channel extends and is continuous to that point, and that it ran through Section 5 and the west half of Section 10, the land of plaintiffs, and in the amenned complaint described.

If we are correct in this statement, and there was no conflict in the testimony as to this slough extending north to Section 24, Township 29 South, Range 23 East, and through Section 5 and the west half of Section 10, in Township 30 South, Range 24 East, then the judgment and order in this case must be reversed, and plaintiffs granted a new trial, and it makes no difference whether there was a continuous channel beyond Section 24, in Township 29 South, Range 23 East, or not.

Such being the fact, we shall first direct our attention to the evidence offered in the case by the plaintiffs and defendant, as to the existence of a channel from where Kern River entered Buena Vista Slough to Section 24, Township 29 South, Range 23 East.

We will first give the testimony of the defendant's witness, who testified to the condition of Buena Vista Slough from the point where it receives the waters of Kern River down to said Section 24.

W. R. Macmurdo, County Surveyor, and regular employee of Messrs. Haggin & Carr, testified:

Map "I" is correct. I am familiar with Buena Vista Slough, from the lake, as far as it goes, as far as there is any slough. I meandered that slough as far as there is any slough to be found; as far as the end. It ends on Section 24, T. 29 S., R. 23 E. I meandered it in part in May, 1879, and in part in 1880.

Q—Have you examined that slough from Buena Vista Lake to that point you speak of where it ends?

A—Yes, sir. It ends on Section 24, T. 29 S., R. 23 East. Wible's Headquarters is on the SE. ¼ of SE. ¼ of Section 15, T. 30 S., R. 24 E.

The slough for the last half mile before reaching the canal is very crooked.

The levee is thrown clear across the slough, and no gate in place where slough was that I could see.

Q—After crossing the levee and going northward, will you describe the slough?

A—This slough continues on pretty much the same character of slough. It is very crooked, gouged out in deep holes on the bottom; has perpendicular banks in places; continues on in that way probably a mile to the northwest, to the north line of Section 15.

The holes are 10 feet deep; outside of holes, take an ordinary head of water, it could probably be 4 feet above the surface of the water.

There may be places in Section 15 where the slough would not hold 4 feet of water.

Through Section 10 the slough, a part of the way, has good banks. It is very crooked; the current is very sluggish and slow.

It has very little fall, and has very low ground on both sides. There are places where the banks are very low, almost as low as the bed of the stream in places. The east side has banks higher than the west side, as a general thing.

Q—The bank is as low as the bed of the slough itself?

A—Yes, sir.

Q—What depth of water will that portion of the slough carry without getting out of the banks through Section 10?

A—I hardly know how much it would carry. In some places it has deep holes in there. Through the greater part of Section 10 it would carry probably as much water as in Section 15, until it got up pretty well up into Section 10. There the banks are lower, and it would carry very little water above the general bottom of the slough.

Q—You think it would carry 2 or 3 feet at every point, without overflowing the banks at all, through Section 10?

Q—No, sir; up to a good way in Section 10. I say I don't know how far exactly, pretty well up into Section 10. The bank on the east side is a good bank. On the west side it is low, and it has a levee along the bank to keep the water from flowing out.

Q—Then in your description of the amount of water, have you taken into account the levee that is used?

A—No, sir. Through the balance of Section 10 the banks get lower, and continue to get lower until it gets up into Section 3.

In Section 3 the banks are lower, hardly any banks at all. It would probably carry one foot of water

along there without overflowing. It is not so crooked as through Section 10; it runs only through a small portion of Section 3. Its course is correctly laid down on Map "I." For the next mile or two, after leaving Section 10, it runs through a little portion of Sections 3 and 4, and some of 5, to the north township line of Section 30.

From the north line of Section 10 to the Township line, the slough is very shallow and undefined. It has banks in some places, and they are very low; in other places it has no perceptible banks, and it is very undefined. The general course of the slough is Northwest; it is crooked, and has a great many bends. The slough through Sections 32 and 31 to the north line of Section 31, is a well defined slough, having banks probably two or three feet high.

Q—Will you look at the map and describe the running portion of the slough, from the north line of Section 31, T. 29 S., R. 24 E.?

A—The slough there has banks, but the banks there begin to get lower, and the slough begins to get narrower and smaller, and shows signs of decreasing in every way its capacity. The slough has a defined channel from the north line of Section 31, though Section 25, T. 29 S., R. 23 E. The slough is very crooked, and is getting smaller all the time to the North line of Section 25, and the balance of the slough through Section 24, for about a half a mile, has very low banks. The banks get lower as you go north, until finally it runs out in the tules; and there is no appearance of a channel. There is no appearance of a channel any further. We were unable to trace it any further—any defined channel.

Q—Your object in making that meander was what?

A—To find and lay down correctly on the map any

channel there might be through that body of swamp land.

Q—When you reached the end of the slough in Section 24, did you go any further north at that time?

A—Yes, sir; I went northwest and northeast, but the water was flowing out all over the country, so that I could survey no further.

I was again along the slough in September or October, 1880; it was dry. I went from the south line of Section 32, along the banks of it, to Bonestell's house; went on the east bank.

Q—How wide is that slough at the various points and parts?

A—It is of different widths; it would average 50 or 60 feet from the south line of Section 32. From there northwesterly, it would average 50 or 60 feet, and just before you get to the end of it, it is just about 20 feet. Gets smaller for about one mile before you get to the end of it. Where the channel ceases where I stopped my survey of it, it had just spread out into the tules.

After October, 1880, I was not there again until April, 1881. I then found a small head of water running down Buena Vista Slough; I don't know where it was running from. I crossed it down below Headquarter's Camp. It was running down there. It was coming from the waste-gate, I suppose. There was no other place for it to come from. The waste-gate of the Kern Valley Water Company. I suppose it was coming from there. I did not go up to see. I know of no other place where it could come from.

Q—How was the water in that slough?

A—When I crossed the slough, or touched it, the water was all in the slough.

That was on Section 32, T. 29 S., R. 24 E. After

I made the survey of that slough, in May, 1880, I went back to the slough north of Wible's Camp, in October, 1880. I went along on the east side of the slough, to Sections 33 and 32, reached the bank about the south line of Section 32. Then went north to the center of the Section, not following the slough, but a short distance from it.

Crossed on Section 32, and went to Bonestell's house; then went northwest probably a mile, not following the slough, but pretty close to it; then turned and went east, to the margin of the swamp. Bonestell is on SW. ¼ of Sec. 24, T. 29 S., R. 23 E.

I was again down north of Wible's Camp, on the land where I have depicted the slough, the 7th of April, 1881. I went from the east side of the swamp to the head of the Weed Island, to about Sec. 32. I did not cross the slough. I kept on the east side of the slough. I came out on the east margin of the body of the swamp land. My object in going there was to see if there was any water running down the slough, and to see if there was any channel through there. I saw no water running down the east side of the slough—no water at all; no channel. I went to Bonestell's house the next day.

Q—Was there any channel there that you saw?

A—Yes, sir.

Q—Whereabouts?

A—I crossed the channel through Weed Island. I did not locate it exactly, probably, on Secs. 30 or 25, T. 29 S., R. 23 E., probably one-half a mile south of Bonestell's house.

Q—Was that the channel you had meandered before?

A—Yes, sir; the same channel; that was the only one I saw. From there I continued through the swamp land to the levee on the west margin of the

swamp. I saw no channel after I left the channel I mentioned before."

Cross Section run by Macmurdo and Fillebrown, from SE. corner of Section 28, *T.* 29 *S.*, *R.* 24 *E.*, *S.* 16° *W.*, *through the Swamp Lands.*

The deepest water we found in making that crossing was $2\frac{7}{10}$ feet, I think. It was on Section 4, T. 30 S., R. 24 E., at some point; it was at the eleven thousandth feet stake where we found the deepest water—$2\frac{7}{10}$.

Mr. HAGGIN. Q—Do you know whether that portion that was depicted on here is the channel you have described as the slough from Wible's Camp to Bonestell's, on map "I," whether that is shown on that 2d profile?

A—Yes, sir; at the eleventh thousandth feet from the SE. corner of Sec. 28, and then it leaves the slough.

I was again down on the body of swamp land North of Wible's Camp, about a week ago—May 15th. I followed the old De Webber Road on Section 20; it is marked on Exhibit "D." I followed the road until I struck the Slough there; then went to Bonestell's house and got across. I think the road dotted on map D is the way the road runs, but I don't know it. We followed that until we struck the slough.

I came up by Wible's Headquarters, and found water running through the waste gate. I went back again to this slough the next morning, May 15. We went down to the point where the levee of the Kern Valley Water Company crossed the slough, and from there followed up the bank of the slough, the right bank, the east side of the slough, to Crocker's place.

Q—Whereabouts is that?

A—It is on Section 10. I believe it is on Section 10, or a part on Section 15 and a part on Section 10.

Q—The east bank of the slough, near Crocker's house, how did you find the slough? What did you see?

A — We found a slough there; a pretty good slough from the levee up to Crocker's place.

Q—Did you see any water there?

A—Yes, sir. There were ponds out on the west side, between the slough and the bank, and then just before we reached Crocker's place, on the east side of the slough, there was some water running out of the slough into the pond on the east side of the slough. That was where Mr. Norton is living now. The Crocker and the Norton place are the same.

Q—Then going along the east bank of the slough, as far as the Crocker or the Norton place, what did you do?

A—I crossed over to the west side, and followed the west side of the slough, thence up to the south end of Weed Island.

Q — You described a levee somewhere along in there, on the west bank of the slough?

A—Yes, sir; it commenced near Crocker's barn, and followed along the west bank of the slough, and follows the direction of the slough, which comes right down here on Section 10, the south line of Section 10, *runs along through Section* 10, *and out through the north end, probably a short distance north of the north line of Section* 10. It follows the general direction of the slough. It seemed to keep the water off from Crocker's place. The ground is low to the west of that levee. There was cultivation to the west of it. In going from Crocker's we went along the levee; it

is higher in some places than in others; where it crosses the low ground it is higher than it is where the slough has a good bank.

Q—Was there any water in that slough?

A—Yes, sir; it was up against the levee in a good many places. Had the levee not been there a good deal of the water would have gone over the west bank of the slough. The levee, I think, extended through the north line of Section 10. I went to the end of it.

Q — How far was that channel overflowed before you reached the end of the levee?

A—I think it was probably a quarter of a mile south from the north end of the levee.

Q—In going along that levee, did you see any water at all to the eastward of the slough?

A—Yes, sir. I could not see far for the tules, but the banks were low in places, and we could see the water right up against the tules; we could not tell what kind of a current it had, or whether much water was running in it or not. *I could see water both east and west of the slough.* After reaching the northern end of the levee, we continued up as near on the bank of the slough as we could; the water was probably waist deep off from the bank. We followed around, and went into the channel at several places. There was water running around the end of the levee, *and outside of the channel of the slough* the water was going in almost every direction. We went from the end of the levee to this point on the slough (pointing out on Map D) on Section 3, between Sections 3 and 4. The levee ran around the general direction of the slough, about as the words "located for actual survey" run.

Weed Island extends down a little beyond Section 32. After reaching the point which is marked "Central

Cut" on "Map D," we came down along the banks of the slough; in the water all the time; the surrounding country was all grown up with tules; the water spread out all over the tules.

Q—*Did you go into the channel of this slough—into the middle of it?*

A—*Yes, sir; the water was waist deep, and from our waist up under our arms, the banks, most of them, were under water; some of them six inches high above the water.*

Q—Could you trace the banks easily?

A—No, sir; not at all.

Q—How did you know where the banks were then?

A—The water was shallower; if you went to either side you would find the water shallower than in the channel; that is the only way we could trace it, and by the tules; the water was spread out all through there.

Q—Then you have followed the slough, you have described up to Weed Island?

A—Yes, sir. I do not know how many times we branched out; * * * sometimes we would get into the channel, and then strike out again. When we got to Weed Island we crossed the slough back to the east side, and went east back to the east side of the swamp, and to the end of the Eastside Canal, following the line of the ditch through there.

Q—Will you point out on Map "D" about where you went?

A—We came on the west side of the slough until we reached this point here on Section 31; on the SE. ¼ of Section 32; from there to the southeast corner of Section 32.

From there we went west along the north line of Section 4. The canal that I speak of was along the north line of Section 4.

Court adjourned for the day.

Q—You spoke yesterday of finding where you went around the end of this, which is depicted on this Map I as a slough; * * * of coming to a flat place, with a gouge in it; how wide was that gouge?

A—Ten or twelve feet is my recollection of it now, two and a half or two feet deep. I think its general course was east and west. I was going across nearly at right angles with the general direction of the slough.

Q—Nearly at right angles with the general direction of the slough? What slough do you mean?

A—The swamp.

Q—By the use of the word "slough," there, you mean the whole swamp, did you?

A—Yes, sir.

(Resuming testimony of yesterday.)

I went along the levee on Section 3, T. 30, S., R. 24 E., we went very near to the Eastside Canal. I don't know whether that levee connects with the Eastside Canal or not. We left the levee before we got there; the levee was disconnected; it ran into some high salt grass hills; it was only between the hills that there was a levee built. That levee would probably have struck the Eastside Canal, about a half a mile south of its present terminus.

When I was down there, and struck the slough by Wible's Camp, I did not notice any water at the waste gate; I didn't go to the waste gate, but I noticed just below where the levee crosses the slough that the water was running in the slough. I found running water there.

Q—Then you had been all along this slough, from Wible's head quarters, up to Bonestell's upon several occasions, it seems. How much water do you

think will flow down that slough to Bonestell's before it will run out anywhere?

A—Well, a very small head would run through there without wasting at the sides. I don't think over a foot in depth would go through without some of it runuing out.

Q—What amount of water? How many cubic feet per second?

A—Well, I think twenty or thirty feet per second. Running through there some of it would waste out in places, on the sides of the slough.

Q—Suppose you turn in sufficient, just not to waste out of the slough, just to go into the slough, without going out, to fill up to the top of the low places, would that amount of water run to Bonestell's?

A—It depended on how long they kept it running; it would take some time for it to run through, if you turned in it while the slough was dry; it would take sometime for it to run through for a good deal of it would soak into the ground; and it would run very slowly; a small head would run very slowly, a large proportion of it would soak in the ground and it would take some time to reach here, because the slough is very crooked, and it is some distance.

Q—Suppose you turned in one hundred cubic feet per second from that waste gate near Wible's camp, how would that water flow, from your observation?

A—Well, sir, a part of it would go down the slough, I think the great part of it would flow over the sides of the slough, over the banks, and spread out over the country, all through the tules. All that went through the channel running through Weed Island, would go beyond Bonestell's a short distance, and then would spread out in the tules, and spread all over the swamp in every direction.

Map H, is substantially correct—it is a map of the end of Kern River, and a part of Buena Vista Slough.

In July, 1880, I was down on the canal of the Kern Valley Water Company. I saw water in the slough from the waste-gate down, a considerable distance. I don't remember how far.

Q—Did you see any water outside of the slough, in the body of the swamp land at all?

A—North of Weed Island, I saw a great deal of water in the swamp land. It was spread out all through the country, I suppose; I could see as far as the edge of the tules.

CROSS-EXAMINATION OF W. R. MACMURDO.

I made map "I." The greater part of it is substantially correct. Kern River is correctly laid down on that map. I did not delineate the lakes on that map. I do not think they are correctly laid down on that map.

The slough marked "Buena Vista Slough," on that map, is correct. I meandered that slough. I did a part of it in 1879, *and a part in* 1880. *In May,* 1879, *I meandered that part from Section* 24, *T.* 30 *S., R.* 24 *E., to the West line of Section* 3, *same township and range.* The water was standing in holes when I ran the meander line. No water running there. In July, 1879, I ran the line from Buena Vista Lake to the point where I started before. At that time there was not a great deal of water in the slough; it was not running; I think not; I don't remember.

Q—When did you meander the balance of that slough from Section 3 *North?*

A—In 1880, *April or May; May, I think.*

Q—What was the condition of the water of the Slough at that time?

A—There was water running through the slough; there was not a great deal; a pretty good head of water going through; I could not just estimate it, because the current is very slow, a very sluggish stream. I crossed it from time to time in 1880. *The water was* 2 *or* $2\frac{1}{2}$ *feet deep; deeper in some places than in others.*

Q—How far did you follow that meandering at that time?

A—To Section 24; *probably the north half of Section* 24, *T.* 29 *S., R.* 23 *E.*

I did not put the line of Buena Vista Slough on map "I." I examined it, and found it to be correct; substantially correct.

Q—What lines are laid down upon that map by actual survey?

A—Well, nearly all of these are laid down by actual survey. That is, the slough there, the river, and those canals.

Q—What slough do you mean?

A—Buena Vista Slouyh.

The South Fork is correctly laid down on that map, and Old River. The branches of New River are laid down on that map from actual survey.

Q—Did you run a meander line on the north, south and middle branches that are represented there?

A—Yes, sir; all of them; they are plotted from my meanderings and survey; I compared the river and slough with my notes, to see if they were correct. *I ran this meander line and located these forks of the river below Tracy's Crossing in* 1879. *Mr. James assisted me*, he doing one part of the work, and I another. I think I ran all of the meander lines of the slough and branches of the river before I left there.

I know the map H, is correct by a copy of my notes. A portion of it I checked off with my notes. I checked off Buena Vista Slough."

Q—There appears to be in Buena Vista Slough certain breaks; what is the meaning of that on Map H, in Section 32?

A—It means where the channel is hard to determine, where the channel is. There are ponds all out there. Those ponds are presented on this map as well as can be.

There is no connection between those ponds, but the water; they are connected by the water when the water is there, but it is spread out, and the banks are hard to determine. I do not mean to say that they are not connected at all, by simply leaving the breaks in there.

Q—Then that map is incorrect, as far as the water course is concerned?

A—So far as that part of it is concerned, that map is correct.

Q—There is no connection between those ponds?

A—This shows the connection.

Q—If it don't appear there, how is the map correct?

A—The map is correct, because the water is shallower between those places, than it is there. (Pointing.)

Q—Then in running a slough, or water course, do you make a break in it, when you come to shallow water?

A—When the bank is not defined.

Q—Although the stream continues a few yards beyond?

A—*Yes, sir.*

Q—If it ran over a flat piece of land for ten yards, you would make a break in it?

A—*If it ran over a flat piece of land and has no banks, I don't make any banks there. I would no t mark a water course where there was no bank and the water is spread out.*

Q—Will you describe the condition of that slough

* * * at that point and between those places on Section 32, on Map "H"?

A—The slough at that place is right at the base of the hills * * * the water comes down there and stands in ponds all through that country. * * * Some of these holes were only a few yards and some were a hundred yards apart.

There were places where, when the holes were filled, the water would run from one to another. The bank of the slough along those hills was about 150 feet high on the west side; on the east side it was as I have marked it on the map, hard to find any bank at all. I should say it was a quarter of a mile before I could find anything to prevent the water from going towards the east. The water would spread over the country for one-fourth or one-half mile, and then would run, if left to itself, the most of it, down Buena Vista Slough. Some water would run through before it would spread that much. But if you should put water enough in the slough, up to the bank, as it is marked on this map, that is enough to fill the slough bank full at a point south of these lakes, it would then spread out half a mile. The banks are of different heights; in some places 2 feet, and some 5 or 6 above the bottom. I mean to say, if you should put 3 or 4 feet of water into that slough it would spread out at that point over half a mile.

I have been on Buena Vista Slough before the Wible levee was thrown across at Headquarters. But I never ran a survey or meander along that slough before that. *I know that it ran like it is laid down on this Map "I," because that is the proper way for it to be there.*

I don't know whether it ran in two branches at that point, or one. I was down on Buena Vista Slough with Mr. Crusoe this year; May 14 and 15 I

think it was. We went from the De Webber place directly to the slough, and from there to Bonestell's; we reached the slough some distance south of Bonestell's, probably a mile. We did not cross the slough where we first reached it, nor did we measure the depth of water where we first reached the slough. We had measured it at that point in 1880. I don't remember exactly how deep it was there. *It was about* 1½ *or* 2 *feet; the bank at the point where we reached it was* 3 *or* 4 *feet high*, and there was more water in it than when we were there in 1880.

From there we followed right on the slough, as near as we could get to it, to Bonestell's — crossed near Bonestell's. *Drove right through the slough. The water was* 2 *feet deep; it came up to the hubs of the buggy.* I don't think it came any higher than that. It did not come into the buggy. Mr. Crusoe was with me in the buggy. I was down there again the following day with Mr. Crusoe. We went where the levee crossed the slough near Headquarters. *We went down the line of the slough, on the east side, until we reached Norton's place; we crossed there on a wire stretched across the slough.*

Q—*How deep was the water at that point?*

A—The water was—I don't remember exactly. They measured it. I did not measure it myself, and don't remember. It was about five or six feet deep.

Q—How wide was it at that point?

A—*I did not measure it; probably* 50 *feet. Where we crossed it at Bonestell's it was probably not over* 30 *or* 40 *feet wide; may be wider. I don't think it was over* 40 *feet.* From Norton's we went down the field a short distance until we struck the levee; we kept on until we struck the slough; probably went half a mile. We then came back along the slough on the levee. We then went back down the levee to the end of it,

one mile or more. We then went north, and kept along the bank of the slough until we got to where the slough made a bend to the south. The water was spread out at the end of the levee, running some in a southwesterly direction. It seemed about a mile before we reached high land again. I don't hink we reached high land until we came to Weed Island. I was with Mr. Crusoe; *we crossed the slough on Section* 32, *near the Willows.* The water was out around the Willows some distance, shallow water. *It is hard to tell how wide the slough was at the point I crossed. The running water was probably* 60 *feet wide; it was waist deep. We waded across, and the water came just up to our waists. It did not come up to our arms, between the waist and arms.*

In running levels from the southeast corner of Sec. 28, T. 29 S., R. 23, we struck Buena Vista Slough at Station 103.

I am County Surveyor, and live at Belle View Ranch. Nearly all the work I have done for years has been for Haggin & Carr.

Q—You speak in your cross-examination, or was saying something about the way the water went in the slough that is depicted on this Map "I," north of Headquarters. About what sort of a current would it have?

A—*The current was very sluggish and slow. If the current was a swift current through there, the slough would not be so tortuous as it is. I think from its very formation it could not have a swift current.*

The notes of my survey of Buena Vista Slough that I produce now, are of that survey down to some point in Sec. 4, 30-24. The notes of survey down to Bonestell's house, I will produce if I can. I don't know where they are.

I have here now notes of the second survey I made on Buena Vista Slough, which I did not have in

Court yesterday. I ran all the transit lines and offsets. A greater portion of the offset lines were run by me. Mr. Dixon ran some of the offset lines. I could not tell by this book how many I did run. If I had anything to occupy my attention, I would ask Mr. Dixon to take an offset from a certain station to the bank of the slough, to a definite point on the bank. These notes represent the survey from about Sec. 4 down to below the Bonestell house.

The slough is correctly laid down on map "I." I have checked it off with my notes.

NOTES OF MACMURDO OF MAY 1, 1880.

He ran west from township corner of Townships 29 and 30 south, Ranges 24 and 25 east, 328 chains and 50 links, to the right bank of Buena Vista Slough, a point a little north of the south line of Section 32, T. 29 S., R. 23 E., and then says:

"The meander line of the slough commences here;" and he then gives in detail the courses and distances of the meander line along the slough, and notes as he goes, the "bend in slough," and finally "to end of any defined bank." "The point where the water in Buena Vista Slough spreads out on the plains, etc."

I asked Mr. Dixon on one or two occasions, to take bearings from a point I was standing, on the bank of the slough, and I sketched in the slough along that point, from that to the next point.

Starting from Government corners, I was enabled to complete these surveys and this meandering, without the necessity of having the other corners. This survey of the slough which I have read off, is a continuation of that which is marked 38, and put in evidence, and called "G" in this case. This is a continuation of the line "G," commencing at Station 2419 plus 75 on line G. Line G commences near Cole's Bridge, and runs along the east bank of

the slough, the most of the way up to a point where the continuation of line "G" commences. Then it continues on to a point near the end of Weed Island.

The survey, the notes of which I have just read, commences at the township corner of Townships 29 and 30, south, Ranges 24 and 25 east, and then runs west to a point near the bank of Buena Vista Slough, and from that point northwest along the slough to its end. There's a short gap between the two notes. From the point where I stopped before, the slough being dry, I was not able to make any survey of it, because I could not trace out the banks of the slough. They were so undefined that I left a gap in there, and was unable to finish it. It was overgrown with tules, the most of it. It was hard to make a survey of it and locate the slough through that portion of the swamp. When the water is running in there, you can follow that portion of it out; but when it is dry, it is almost impossible to do it.

The COURT. Q—*In what section is that?*

A—That is in Sec. 4, *T.* 30 *S., R.* 24 *E. It runs diagonally through that section.* These notes show no meandering through there, except near the point where I first struck the slough, for a short distance southward. From that point, I took the notes of the way the slough ran. I went along right through there, and located it from observation as well as I could.

Q—Then you have examined that portion, have you?

A—Yes, sir.

Walter James, a civil engineer, and regular employee of Messrs. Haggin & Carr, testified:

I first visited Buena Vista Slough in the spring of 1871, April or May.

First went to Buena Vista Slough on Sec. 2, T. 30 S., R. 24 E.

There was water there running in a slough. A narrow slough, and quite crooked. We traveled northwest along the slough. The point I have spoken about was on the swamp land embraced in Swamp Land District 121, and on about that Section (2).

Followed the slough northward perhaps half a mile, we then came to water spread out over the tule land. I could not tell how wide it was spread out.

Macmurdo ran all the lines of the channels represented on Map "H." He ran a meander line along Buena Vista Slough, as represented on that map, the whole distance represented on that map.

L. Crusoe, a regular employee of Haggin & Carr, testified:

I was on Buena Vista Slough last Saturday, 14th May. Went on De Webber road, and struck channel south of Bonestell's house, three quarters of a mile, and then turned down the slough, and crossed just south of Bonestell's house. Found water in the slough.

Next Sunday, 15th, went back to the swamp. Went along the slough to Crocker's house, on Sec. 10, T. 30 S., R. 24 E.; the water was confined to the banks there; we crossed the slough near Crocker's barn, and then followed along the general direction of the slough nearly a mile; then we got right into the slough. The levee followed the general direction of the slough, at times touching the main slough on the west side.

After going along the levee to its end, over a mile, we continued along down the slough. We did not cross the slough. We waded along the edge of it, and in places it was waist deep. I suppose if

we had gone across we would have found it deeper.

We followed the slough in a northwesterly course down to the willow tree that is on the edge of Weed Island. I think on Section 32, T. 29 S., R. 24 E.

CROSS-EXAMINATION.

The slough at the Bonestell House is 50 or 60 feet wide; the water was confined to its banks, and ran into the bottom of the buggy where we crossed.

The slough at Crocker's house was 50 or 60 feet " wide; water about 6 feet deep; a sluggish current there. I did not measure the depth of the water at any point where the levee touched the slough.

We waded across the slough right at the Willows. The water came within a few inches of my arm-pits, and was 60 or 70 feet wide; a current there. Macmurdo was with me on this trip.

T. R. Fillebrown, a civil engineer, and regular employee of Haggin & Carr, testified:

Was last Sunday on swamp land below Wible's Headquarters. I went from the Eastside Canal to the slough; followed down that slough to the Willows, on what is known as Weed Island. I followed the slough a part of the time. We followed along the levee that runs along the north line of Section 24, T. 30 S., R. 24 E., until we came to the waste gate which discharges in the old slough, on the north side of the Kern Valley Canal, went to the Eastside Canal, and then went beyond that to the slough.

Q—Went on beyond that to the slough. Was that the main slough there, do you know?

A—Well, it had the appearance of being.

Q—Is that the slough that runs right up in the vicinity of Wible's Camp?

A—Yes, sir. We left the levee there near the head gate, the waste gate discharging into the slough; that is on the levee of the main canal, at the waste gate. From there we followed down the slough. We kept right along close to the bank of the slough, to a point opposite Mr. Crocker's house, and a little below there, two or three hundred yards. We were on the east bank, or the northeast. I believe Crocker's house is on Sec. 15, T. 30 S., R. 24 E., very near the north line, on the northwest quarter (points it out on Map D). In going along the east side, opposite Crocker's house, we struck a little overflow from the slough; it was almost stagnant; moving very slowly out from the slough, in no channel. It was spreading out a good deal on the east side of the slough.

We went on down the banks of the slough as well as we could; we came across a great many of these short bends, and here and there found water. The first place we came to water below this place, opposite Crocker's, was 200 or 300 yards below Crocker's house.

Q—Was that water that you found in the slough?

A—No, sir; when I speak of finding water, I mean water outside of the slough. There was water in the slough. The water was on the east side, outside of the slough. It came from the slough overflowing its banks. We found such places very frequently. I was walking on the bank of the slough, on the east side.

Q—How far did you follow, generally, the slough there?

A—We followed it down to the willows on Weed Island. I am not positive as to location of the willows, but I think they are at the sharp bend on the southwest quarter of section 32. That is about

the distance I estimated that we had traveled. They were at a bend similar to that where it takes a sharp turn to the westward.

The willows stood right on the bank of the slough. We were on the east side of the slough all the time. We did not go through the channel of the main slough at all. The levee of the Kern Valley Water Company crosses the slough right about where the waste gate is that I speak about. That was the only way for the water to get into the slough. In going through there I found no channel east of this marked "Buena Vista Slough" on Exhibit "D," nor any slough running from it; simply this overflow that I have described.

Running levels across the swamp land from the Southeast corner of Sec. 28, T. 29, S., R. 24 E., Station 103, was in "Buena Vista Slough," a short bend in the end, not in the center, elevation 97.6. Station 104, elevation 98.4 at right bank, water 0.2 feet deep. Station 106 "bottom of slough near left bank" deepest water 2.9 feet. The west bank was nearly vertical and elevation 99.5, making the bank 4 feet higher than the bottom of the slough.

Q—What do you mean by the right bank?

A—In speaking of the right bank of a watercourse it is always understood that we are passing down the stream. In this case it would be the east bank.

Q—How wide was the slough at that point?

A—We did cross it exactly at that point. It was simply a bend in the slough. Station 105 was at the edge where the water was 0.2 feet deep. As near as I can remember, the slough was 50 or 60 feet wide. The notes will show pretty nearly. It was nearly 100 feet wide where we crossed it; we crossed it a little diagonally. The slough would be about 60 feet wide. Station 106 was in the bottom of the slough, near the left bank, the deepest water was 2.9

feet. Then only a foot or two further we took a point on the west bank of the slough, the bank being quite abrupt, 99.5. The last before that 95.5.

CROSS-EXAMINATION OF T. R. FILLEBROWN.

When I was down on Buena Vista Slough last Saturday, I followed along the north side of the main levee of the Kern Valley Water Company to a point where the water ran through the weir and into the slough, and then followed that slough down. I followed it down to the willows on Weed Island, but not on the slough all of the way. The slough is 40 or 50 feet wide, where it takes water from the weir, I guess. It is difficult to state the width of the slough, from the weir down to Norton's or Crocker's house, it is so variable. It varies all the way from 35 to 65 feet, perhaps. I did not measure the depth of the slough at any point on the slough. I followed the slough down to the willows. I cannot locate the willows positively. I think they are on the southeast corner of Section 32."

Across Swamp Land from southeast corner Section 28, *T.* 29 *S.*, *R.* 24 *E.*. *S.* 16° *W.*

Station 105 was just on the edge of the water. Still on the east side of the slough, I crossed the slough at that point; the deepest water was 2.9 feet. On our line it was 100 feet, as near as we could pace it. The water was running; some current, but not a rapid current, quite sluggish in fact.

The west bank was quite solid; well defined. The right bank a more gradual slope; not so well defined The water was not overflowing the banks at the point where we crossed. We crossed the slough on the course S. 16° W., as near as we could."

" Mr. HAGGIN. Q—You have used the word 'slough' " a number of times. In some places you speak about

"going up and down and across a slough. What "meaning do you attach to the word 'slough?' Do "you mean the channel, or what is dug out there as a "channel, or the whole body of swamp land?

"A—That whole body of land constitutes the swamp, "as I understand it, and down to a certain point. "There is a water course different from the other "courses.

"Q—The only reason I asked the question was, that "there should be no misunderstanding in the report- "er's notes. You have used 'slough,' sometimes, "referring to the whole tract of land?

"Mr. HOUGHTON. Ask him what he means.

"Mr. HAGGIN. Q—What reason did you have when "you said, for instance, 'I will give you what you "said?'

"A (interrupting)—Speaking of that country down "there, we have always understood, that if we were "going towards Tulare Lake, we were going down the "slough; and if we were going southward, we were "going up the slough. If we were three or four miles "back from the slough, down the swamp land, going "in that direction, we would say we were going down "the slough.

"Q—In using those terms, did you have in your "mind at the time any particular channel?

"A—I don't know anything about the existence of "any channel there except as I have found it at points "where I have crossed it. Where I have made the "lowest cross-section, down near Dover's camp, I "found no channel that I could call a water channel. "But still, if I was going in that direction, I would "say that I was going down the slough, because it is "a convenient term, and one that everybody under- "stands.

"Q—Simply a term that you have agreed to use, "without attaching any particular meaning to it?

"A—Yes, sir. If there had been no water there for "years, yet, with the understanding that that way was "down, and the other way was up, we would say so.

RE-CROSS-EXAMINATION.

"Q—When you speak of your Saturday's trip of "going down the levee, and then, after going down "the levee some time, coming to Buena Vista Slough, "and then from that slough down to the willows, do "you mean that, in that connection, you followed the "swamp land, or that you followed the water channel?

"A—In the first place, I have not referred to any "trip on Saturday. It was Sunday; but I do not "really mean either one.

"Q—You didn't mean to say——

"A—(Interrupting.) I did not mean that I followed "exactly the channel of the slough or the margin of "the swamp land.

"Q—You referred to something that you styled a "slough, as following close to it?

"A—Yes, sir.

"Q—Opposite counsel seem to make it appear that "every time you refer to a slough there, you refer to "the whole body of swamp land. I want to know if, "when you said that on Sunday you went down along "the west side of the levee, and came to the slough, "and followed that slough, or along on that slough "until you came to the willows, what did you mean by "slough?

"A—When I said 'slough,' I meant the slough. "That is, that all along through there the slough has "a channel which is well-defined along there by the "Crocker place; and I followed close to the banks of "that channel in places, but in other places I departed "from it a considerable distance, in order to cut off "these long bends referred to, and finally struck this "levee, and followed that because it was easier trav-

" eling, and I could see the country better from that " levee than in the tules, which were there, all along " down there, between this levee and the channel.

" Q—When you started on this leveling trip across " from Section 28, and say that you came to Buena " Vista Slough, what do you mean ?

" A—I mean that I came to this same slough that I " referred to, that was up to the Crocker place.

" Mr. HAGGIN. Q—You spoke of going to a slough. " I understood you, in your testimony, all the time, " to be referring to what is described on Map ' D,' " and marked ' Buena Vista Slough ' ?

" A—Yes, sir.

" Q—Do you know anything about Buena Vista " Slough, independent of that mark on Exhibit ' D,' " yourself ?

" A—If I was to come to it in a strange country, I " would not know the name of it as Buena Vista " Slough.

W. H. Souther, a witness for defendant, testified:

I know the body of swamp land lying between Wible's Headquarters and Tulare Lake. I attempted to farm down there in the Spring of 1878. I was on Sections 2 and 11. I used, in connection with my work there, a copy of the Map "D," made by Mr. McCray.

I can designate on that map the land I cultivated or sowed—a portion of the south half of Section 2 and Section 11. Then I went down on Sections 3 and 33, and made a road down there. Think it leaves the canal on Section 2. My roadway is there yet. I ran through Section 3. Struck the canal about a mile below the corner section of 33 and 34. I followed that section line to my camp, which was upon the side of the slough, at the end of the cut, which was marked "Central Cut." The design of that cut was to convey

waters across the flat. In the slough there was a break; a place wide and flat. There was no slough to amount to anything.

Q—Could the water run through the slough at that point?

A—Well, it spread. The water when it got to this point, spread all over the country.

Q—What point is that?

A—The upper point of this cut, marked "Central Cut." That terminated on the line between Sections 3 and 4. It ran down to the northeast corner of Section 5. When the water flowed down the slough here, this crooked slough here as you see it marked on the map, and got to that point, that is the south point of Central Cut, as marked on Map D, it spread out to the south. It was right in the flat, slough or channel there as marked, though that slough or channel had banks principally on the north side; if I remember right, there is very little bank, if any. In places there was a small bank on the south, and the water would flow over to the south at that point. I plowed some of Sections 33 and 32, in Township 29, Range 24. I left there. The water drove me out. The water flooded the crop. The water that flooded me out came in from the east. The slough was filled up.

Q—What do you mean by the slough, Mr. Souther?

A—I mean the tract of swamp and overflowed land.

Q—Using the word "slough;" you mean generally the tract of swamp and overflowed land?

A—We generally call that the slough lands; Buena Vista Slough lands is the common term we use to describe those lands.

Q—You are not, in the use of that word, referring to any particular channel, are you?

A—No. There was no particular channel of water;

the water came down the channel until it reached a point just below the head-gate, perhaps about half a mile. There were some depressions there. We termed them sloughs. It ran from the canal on the east side back to the east line of the canal here.

Those were what we term the slough. It was a depression in the land that ran back there. The water, when it came back there, flowed out into this channel. The bank is lower than it was here; back in the main-described channel here.

When the water was turned through that head-gate, a few rods above the camp, into Buena Vista Slough, it ran down here somewhere. *I never was there, from the fact that there was so much water there I could not get by it. I went down to the west side, the west bank. It was not all of the way down, but the west banks were low there, and threw it out here.* The water came in here to the bank of the canal. I threw the water right up against the east bank of the canal. It flowed down here through the break in the slough, where Mr. McCray left the break in the slough. The depression there was low to the east; that is, on Section 15--Section 14—it must be 15, in Township 30, Range 24. Then it flowed down over the country there, from there clear to the slough. *There was so much water, that I tried several times to get through there, and usually failed to get through.* I threw my roadway up. There was water along on both sides of the roadway. I used it as a canal and roadway both. I tried to follow the little weed islands; that is the reason I ran the road crooked. Following these around, I came to the north line of Section 4, Township 30, Range 24. Then I followed that section line or township line to the slough, until I stopped at the camp. I think that was in April, 1878.

I did not succeed in farming down there. The water

finally got all through the country, so that I could not easily get in, and I became a little disgusted with the country down there and left it. That was in May, 1878. I think I left there in May. At that time Mr. Bonestell was living down there.

Q—Did he have any water down there?

A—Well, he said he had some water. There was a little water in the slough; a little had run down in the slough at the first rise. It was either in January or February.

Q—The water had spread out over the country before it got down to Bonestell's?

A—A pretty large portion of the water ran to the east line of the canal, and went down that portion of the slough. When it got to the upper end of this central cut, as marked on this map there, it ran off to the east; took a large body of water in order to get down the slough enough so that Bonestell could irrigate with it. Hence, when they turned it in on Bonestell and supplied him it flooded me out.

Vandoran Stoner testified that he had hauled hay off and on for a couple or three months to Wible's camp, and crossed the swamp land district and Weed Island, and that he did not cross any channel.

And on cross-examination he testified that he crossed Weed Island on the De Webber road, and that there was no natural bed along the road that he remembered.

J. S. Ellis, the other witness, testified that he had crossed the swamp land district below Wible's camp a few times, and hauled hay across there in 1877 from Wible's, and crossed by what is called the De Webber road, and crossed Weed Island. Crossed five or six times.

"Q—Is there any continuous channel or bed of a "stream anywhere in there; through there where you "crossed?

" A—Well, I have never noticed any slough. I " don't know that there is. I noticed when I went " there that there was not as much of a channel as I " expected to cross in that place.

" Q—Was there a road there ? A good road ?

" A—Yes, sir; a very good road for tule land.

" Q—Did you see anything that indicated the regu- " lar channel of the stream ?

" A—No, sir; I would not call it a regular channel. " There were sloughs, might have been. I didn't fol- " low them down. There were sloughs.

" Q—Sloughs on each side of you as you were pass- " ing ? Holes, you mean ?

" A—Yes, sir; some sloughs along.

" Q—What do you mean by sloughs ? How would " you describe them ?

" A—Well, there are holes where there had been " water, but there was no water in them. There was no " water where I crossed. I didn't see any but what " was pumped.

" Q—You have never crossed it except at that " point ?

" A—No, sir; I never crossed right across, and " never made any special observation about it.

" Q—I understood that you did some hauling in the " swamp land district, across where Weed Island is, " in 1877 ?

" A—Yes, sir; I used a four-horse wagon.

" Q—What kind of a road did you have across " there ?

" A—It was a good fair road.

" Q—How did it compare with the roads on the " higher ground ?

" A—Well, I hauled my loads through as easily as " I could there, without any trouble. The swamp " land where we went through then was grown up " with tules. The most of it was on wet land. The

" most of the way it was swamp and tules on both sides of the road the most of the way, I think.

Q—In going along there, did you find depressions in the swamp ?

A—It was a fair road. There might have been. I don't remember about the sloughs, because they were dry.

Q—Do you remember any channel at all ?

A—There was a channel, but not deep. I suppose it was where the water had run off from the swamp, but it was dry there.

Q—It did not strike your attention any more in one place than in another ?

A—Well, there was a place appeared to be lower, a sag like, but nothing but what you could go right in at that time.

Q—How wide was that place ?

A—I don't remember now. I cannot say. I think it was along the water edge of the island; of Weed Island I think it was.

" Q—Did it show any signs of its ever having been " a water course along there ?

" A—There was water flowed all through there. The " water would run all over the swamp, and tules were " growing all through the swamp.

CROSS-EXAMINATION OF J. S. ELLIS.

" Q—Where was this depression that you speak of ?

" A—Well, as near as I can remember, it was along " in close to Weed Island. I think we had to go a " half or three-quarters of a mile after turning into " the swamp and overflowed land before we would " reach this depression.

" Q—How deep was that depression below the ground " on each side ?

" A—I don't know as I can state exactly, because I " was not paying any particular attention, but was only

" going through with somebody; did not suppose I " would ever—it was just like anybody would go along " the road. After I got over it—

None of the other witnesses of defendant testified specially to the condition of Buena Vista Slough from Headquarters down to Section 24.

Here we have the testimony of three civil engineers, two of whom have meandered this slough down to Section 24, and the map or plot of such meander survey (Exhibit I), on which is delineated a channel to that point, and the testimony of both the surveyors, Macmurdo and James, that that map is correct, and that Buena Vista Slough is correctly delineated on it down to said Section 24; the other civil engineer, Fillebrown, testifying that he has followed this slough from Headquarters down to Section 24, and giving its width and depth at different points; the testimony of Cruso, who followed it from Headquarters down to Bonestell's, and gives its width and depth at every place where he crossed it.

All of the above named witnesses of defendant testify that there is a continuous channel from Headquarters down to Bonestell's House.

The only conflicting testimony is that of Stoner and Ellis—if that can be said to be conflicting—who testify as to the crossing of the slough at the DeWebber road, and the rambling testimony of W. H. Souther, which we have given in full, and by his own statement it appears that he could not get to the slough when he was attempting to farm land along its margin.

We think we have established the fact, without the aid of the testimony of any of plaintiffs' witnesses, that this is and always has been a continuous channel and water course down as far as Section 24, Township 29 South, Range 23 East. But as the finding is against

us as to this fact, we will give the evidence of plaintiffs' witnesses as to the condition of this water course down to Section 24, Township 29 South, Range 23 East, and through the portion of plaintiffs' land that is south of such point.

We will take plaintiffs' witnesses in the order in which they were called, after first giving the testimony of F. P. McCray, a civil engineer, who made a meander survey of the slough down as far as Section 24, Township 29 South, Range 23 East, in 1877-8, and who made two maps or plats of such survey, and which are in evidence (plaintiffs' "Exhibit 2" and defendant's "Exhibit B."

F. P. McCray testified:

I have had 12 years' experience as a surveyor, and am ex-County Surveyor of San Benito County. Have made surveys in tracing the sloughs that runs through the body of the swamp and overflowed land along Buena Vista Slough. (Map 2 is produced.) That map has on it a correct delineation of the slough or channels that run through that body of swamp and overflowed land so far as it extends. I made the survey of the slough. A portion of the slough has been meandered down to Section 14, T. 29 S., R. 23 East, and from that point all that portion shown on this map was subdivided by me, and at the crossing of the section lines the sloughs were noted, and the balance sketched in between them. They were sketched in on the field. (Map 3 produced.) This is a map commencing where the other leaves off. I have meandered Buena Vista Slough, from where the north branch enters it at the 'Point of Hills," down to Section 14, T. 29 S., R. 23 E.

The channels of Buena Vista Slough, as delineated on Maps 2 and 3, are correctly expressed as they now exist on the ground. It does not cover the

whole distance to Tulare Lake; it comes within two or three miles of it. The survey extends through all the land described in the complaint. The land described in the complaint is designated on these maps by being bordered in red.

CROSS-EXAMINATION OF F. P. McCRAY.

I personally meandered that slough, from where the North Fork of Kern River enters Buena Vista Slough, down to Section 14. The line of that slough on this map represents the meander lines — represents the slough. By the slough, I mean the channel that runs down through the swamp land. At the time I surveyed it, there was no water in it. That was in December, 1877. The channel was marked by perpendicular banks, and by various widths and depths. There were places where it was fifteen feet deep, and others perhaps not more than three feet deep. In running that meander, I located that slough by metes and bounds—that portion of it. I established stations at every bend of the channel, and took the courses and distances between those points, and from one bank to the other.

In meandering that slough to Section 14, I did not observe any place where there was no appearance of a channel. At a point before reaching Section 14 the slough widens out, and the banks are not so perpendicular as they are above there, or a little farther down.

I am positive there was a continuous, defined channel down to the north boundary of Section 24. At that point the channel changes and widens out somewhat, and the banks are not so perpendicular. It could be crossed easily, and it was more of a water way.

Q—Has the slough defined banks?

A—I would so term it; it was a channel. It was

to be easily seen water would flow along that place. I could see that water had flowed along there, and see the marks of the water, and a sort of defined margin.

I did not meander or pretend to locate the slough beyond Section 24, Township 29 South, Range 23 East, at that time.

We then have the testimony of two of defendant's witnesses, who testified to drawing hay along the De Webber road and across the Buena Vista Slough land.

We call special attention to the map (Exhibit "I") placed in evidence by the defendant, and upon which is traced Buena Vista Slough from Cole's Bridge to Section 24, Township 29 S., R. 23 E., a distance of 12½ miles in a straight line, and at least 18 miles following the course of the slough, and made by the civil engineers employed by the defendant, and delineated, they both testify, from a meander survey of such slough made by them in 1880;

And to maps (Exhibit "B" and Exhibit "2") made by McCray, a surveyor, who made a meander survey of Buena Vista Slough in 1877–8 for the Kern Valley Water Company, and at that time made Map "B," and delineated on it Buena Vista Slough as far as he meandered it.

These two surveys, although made by different parties, and one three years after the other, and one by an engineer employed by a corporation not connected with this action, and long before this action was in fact commenced; the other after this suit was commenced, and by defendant's engineer, and to be used on the trial of this case, still we find this tortuous channel of Buena Vista Slough located on both maps precisely alike. Any one, upon an examination of the plats "B" and "I," would say that Buena Vista Slough was located on them from the same survey, and not from two independent surveys, made by differ-

ent parties, in the employment of different persons, and for different purposes. The testimony afforded the Court by these maps alone, and that of the surveyors who made them, could only warrant a finding of fact, to the effect that Buena Vista Slough was a definite water course from the point where Kern River emptied its water into said slough down to Section 24, Township 29 S., R. 23, and that the lands of plaintiffs bordered on such slough.

And no testimony offered by the defendant to show that their own surveyors had not made a correct survey of the slough, and that the map made by such surveyor was not a correct one, can be said to have created a conflict of evidence as to whether or not there was a continuous slough down to such Section 24.

ALEXIS GODEY.

I am 64 years of age; came here with Fremont, and was his second in command. I first saw Buena Vista Slough in 1858; crossed it at what is called Old Tracy Crossing. That was the regular crossing from here to San Emidio. Saw the slough from that time on to 1868, the last time I saw it. The slough continued to run then, and was about the same width as when I first saw it; no change in it that I could see.

ELISHA STEVENS.

I am 77 years of age. I first came to what is Kern County in 1845, and camped right at the head of Kern Lake, where the South Fork entered Kern Lake. I ran with a canoe from Buena Vista Lake to the mouth of New River, and went down Buena Vista Slough about 15 miles, I think. It was deep and crooked; not very wide. I went about 15 miles. There was a big drift of redwood that blocked me out with the canoe, and I could not pass it at all. That was after the last flood. When the water ran down through the South Fork into

the east end of Kern Lake, and down this channel by Hudnut's, between the two lakes, after it reached the two lakes each went to Tulare Lake.

CROSS-EXAMINATION.

Q—From what point did you run up in the canoe?

A—I told you I came up the stream and then turned around. I called it the summit of the river. The river ran to the foothills (New River), and then divided its waters, and part went south and part north. That is what they call New River now. That was about eight years ago. I ran about two miles, I think, or three, up New River from Buena Vista Slough. At that time the water of New River was discharging itself, some into Kern and some into Tulare Lake, running that way; I did not go to where it stopped. There was no other discharge, no other place for it to go. I ran up New River above the slough two or three miles, and then went down the slough 15 miles; that was in the spring, at an ordinary stage of water, not as high as now, but pretty near; the water was just flush. It was a strong river. Buena Vista and Kern lakes at that time were not a connected sheet of water; there was a slough between the two—a good wide slough. It is only in times of freshet that the whole country from the mouth of New River down to Tulare Lake is covered with water—not by ordinary freshets; but the water would run through and we could catch fish.

Q—There was one continuous sheet of water from Buena Vista Lake to Tulare Lake in times of ordinary freshets?

A—It was cut up with islands. It ran together, of course; it was parted off, and ran together again; there was one body of water that ran from Buena Vista Lake to Tulare Lake.

Q—In times of high water, there is one continuous sheet of water from Buena Vista Lake to Tulare Lake?

A.—When the water stayed up, there would be, of course.

Q—In times of very high water?

A—It would pass the water clear through.

Q—About how wide would the water be in that slough from Buena Vista Lake?

A—On the slough, as far as I went, it was crooked and deep in places, and as wide as this house.

W. W. Hudson.

Am 59 years old, and came to Kern County in 1859; went into Government employ as chief herder; when I first came here the old South Fork was the main channel of Kern River, and emptied into Kern Lake at the east end. After the flood of 1862 the water separated, and a portion ran down through Old River into Buena Vista Slough, between Kern and Buena Vista Lake, and a portion still in the South Fork.

The water continued then down what is called Buena Vista Slough to Tulare Lake, down through Buena Vista Slough. I was first on Buena Vista Slough in 1859, or, perhaps, in 1860 or 1861. I cannot remember when I was there last, whether 1872 or 1873. There was no material change in the slough between 1859 and 1872 or '73; the channel is the same now as it was then. I drove a great deal of stock through there from 1862 to 1872 or '73. I think I made my last trip, perhaps, in 1872. I drove my stock on the west side of Buena Vista Lake, and thence on the west side of Buana Vista Slough to Tulare Lake. We followed Buena Vista Slough, in order to get water and camp.

Q—How many times, between 1859-'60 and 1873, did you go from Buena Vista Lake, down Buena Vista Slough, to Tulare Lake?

A—I could not enumerate that, sir. I drove a great deal of stock, sometimes once and sometimes as often as three times a year, from 1862 to 1872; and drove

along Buena Vista Slough, from Buena Vista Lake to Tulare Lake; always found a slough when I went down. I always found water for camping purposes; sometimes it would be deeper than others.

Q—How was it about finding a running stream there usually or not?

A—Well, sir, there was a current; it was very gentle; in places where the slough was cut down and was narrower there was considerable current. Where it had been spread out, and tules had grown up, it was dead water, or comparatively so, yet there was a current. When I last saw the slough the water was running through the same channel as when I first saw it.

CROSS-EXAMINATION.

From 1859 to 1880 I was familiar with this stream of water in this country.

Q—And your business during that time took you through this country along Buena Vista and Kern Lakes and Tulare Lake a good deal?

A—From 1862 to 1872 consecutively. For eight years I ain't seen the slough so frequently. During a period between 1862 and 1872 I did not observe any change in the current of that water or the appearance of it in that swamp land country between Kern Lake and Buena Vista Lake. There is more or less current; it depends upon the season; but one year with another, during those ten years, it was about the same.

Q—Which way was the current?

A—Towards Tulare Lake, and from Kern Lake to Buena Vista Lake. The current connecting Kern and Buena Vista lakes was from 150 feet to half a mile in width. During the flood of 1862 there was a current in the sheet of water from the Buena Vista Lake to Tulare Lake, and a current clear through into the San Joaquin at that time. That was water that first came

from Kern Lake into Buena Vista Lake, and down through Buena Vista Lake, and through Tulare Lake, and into the San Joaquin through what is called Fish Slough. I presume at that time there was a current through Tulare Lake. Kern and Buena Vista lakes have varied very little in the twenty-one years that I have been acquainted with them. There is always sufficient water from the snows of Kern River to supply these lakes. They filled up usually before the ditches were taken out and the absorption by evaporation and irrigation. I don't think it varied more than two feet. Between the year 1860 and 1872, leaving out the years of drouth, there was always a large body of water in Buena Vista Slough when we passed there; from January to June, when the water was higher, there was a large body of water in the slough, sufficiently large to prevent our crossing it with stock. It was generally several miles wide at certain portions of the year when the water was highest.

SOLOMON JEWETT.

I came to Kern county in 1860, and have resided there ever since. I first crossed Buena Vista Slough in January, 1862. I know where the waters of Kern River empty into Buena Vista Slough. I was there two years ago; the most of the water was going to the right.

When the waters of Kern River were running into Kern Lake, through the South Fork, and through Old River, the waters would go into Buena Vista Lake and from there towards Tulare Lake; and when the waters were high enough, I understood it ran into Tulare Lake. I have followed Buena Vista Slough from where it leaves Tulare Lake, down about twenty miles; that was in 1862, '63, '64 and '65. For the first three or four miles, there was a running stream, after that I was sometimes away from it, and sometimes up to it,

watering stock. During those years I did not go to the slough to any place where it was dry. There was always water where we touched it.

CROSS-EXAMINATION.

If the drop in the bridge had not been put into Buena Vista Slough, the water of Kern River would have run into the lakes until they were full, and then run back again, after they got full. The waters would naturally run northward. I have been northward on Buena Vista Slough, about twenty miles. There was a running stream through the slough at that time. I usually started in February. I was there in 1862, '63, '64 and '65, driving stock to San Francisco.

RE-DIRECT EXAMINATION.

Q—You say the waters from Kern River would run into Buena Vista Lake, until it filled the lakes up, then it would run out again. When it ran out again, where would the water run?

A—Run down Buena Vista Slough, into Tulare Lake.

Q—Is that true of the lakes, ever since you have known them, that they filled with water, and then the water that escaped would run down Buena Vista slough?

A—As I understand it.

JOHN BARKER,

Forty-nine years old, a stock-raiser, and residing on Kern River, at Rio Bravo Ranch for six years last past.

I first visited what is known as Buena Vista Slough in the fall of 1854. We were hunting. We came to the east end of Tulare Lake, and followed Buena Vista Slough up to Buena Vista Lake. That was in October. There was a current in that water towards Tulare Lake. We crossed first near Tulare Lake. In

Buena Vista Slough, for the first five or six miles from Buena Vista Lake, there seemed to be plenty of water and myriads of fish in it. That was in 1854. I next visited Buena Vista Slough in 1856. Came up with Montgomery to look at the slough; to examine the water connections between the lakes Tulare, Buena Vista and Kern. We went up to examine the water connection between the lakes and test the feasibility of the project of constructing the canal; to examine the sloughs, and connections between the lakes, all the way along.

Q—What did you find the condition of things between Tulare and Buena Vista lakes?

A—We found water all of the way along in the slough between the lakes. The water was running at the time in the channel where we struck it. It must have been August or September, 1856. We crossed Buena Vista Slough, between Tulare and Buena Vista lake, five or six times, I think, and at the place where I saw it, I think it was between 30 and 40 yards wide. Wherever I could get to Buena Vista Slough, between Buena Vista Lake and Tulare lake, there was an open water communication all the way.

I was there again in the fall of 1856, and the condition of Buena Vista Slough was similar to what I saw it before.

I visited the slough again in 1857. Its condition was about the same as in 1854, '55 and '56. The water was at that time running all the way from Buena Vista Lake to Tulare Lake. It was in the Fall.

I was there again in July, 1858, and the condition of the slough was about the same. We made our crossings on tule rafts. We found the water flowing at that time from Buena Vista Lake to Tulare Lake.

I was there again in 1859, along in the summer season, after the freshets were passed. There was no change that I could see. We crossed the channel to

and fro on the tule boats. Every time I made these trips we would go the whole length of the slough, from Tulare Lake to Buena Vista Lake. After that, I did not visit Buena Vista Slough again until about two years ago. I went down as far as Epperly's hog camp.

CROSS-EXAMINATION.

I was familiar with Buena Vista Slough continuously from 1854 to and including 1859. I saw it all of those years. During those years there were no great freshets. I was there during those years after the spring rises.

Q—I understand you to say that you found water plentiful all along, flowing, or a current, all along down Buena Vista Slough to Tulare Lake?

A—Yes, sir. I should think it was a one or two-knot current in places where I struck it; one or two miles an hour, I mean. It was usually about the width—as far as the width of the slough was—it was as broad as the slough was—the open water. What I call the slough, would be where I found the open water. What I call the channel of the slough, is where we got to open water. I think the channel was 30 or 40 yards wide.

Q—That was continuous, all through, from Buena Vista to Tulare Lake?

A—I could not tell that. I say wherever I got into it and could see it, there was a channel and a current. I know there was a continuous running stream during that time from Buena Vista Lake to Tulare Lake, where I got into it; that is all.

Q—How deep was this channel?

A—Well, in some places we had a long pole, perhaps 12 or 15 feet long, and in some places we could not touch bottom with it—that is in the slough between the lakes. It was a general and continuous current.

Q—From 12 to 15 feet deep?

A—In some places we could not touch bottom with a pole of that length.

Q—How shallow would it get?

A—From that down to nothing on the shores. I found places where it was not more than 4 or 5 or 6 feet, perhaps. I don't think there were many places under 4 feet.

Q—Then your opinion is that the water was running at least 4 feet deep, and it was 40 yards wide?

A—Well, yes, I expect so, at any place where I found it, about that rate. This was its condition from 1854 to 1859, inclusive. We crossed Buena Vista Slough at different points from Tulare Lake to Buena Vista Lake. When I went with Mr. Montgomery, the object was to discover whether there was an open channel of water connecting the two lakes, Tulare and Buena Vista Lakes.

Q—The object was, as I understand, whether there was a current?

A—Whether there was a channel of water; we were not looking for a current particularly. That was in 1857. I was there again in 1857. The trip had the same object. I was there with other parties to whom these representations had been made from knowledge gained in a former expedition, and we wanted them to see it.

J. V. ROSEMEYRE.

Came to Kern County in 1856.

CROSS-EXAMINATION.

I was at Tulare, Kern and Buena Vista lakes in 1864. I was there in 1858, '59, and June '61. Kern and Buena Vista lakes were not then one sheet of water; they were connected by a channel. They always used to have an abundance of water in them. In 1859 I crossed Buena Vista Slough I suppose four miles below Buena Vista Lake; was hunting elk; made tule boat to cross on. It was in June.

JAMES C. CROCKER.

I am one of the plaintiffs. Have resided in Kern County since 1869, permanently.

I first saw Buena Vista Slough in 1854, driving cattle along the slough from Buena Vista Lake to Tulare Lake. The slough at that time was full of water all of the way down.

Next visited the slough in 1855; went there with a drove of horses, struck it at a point where the slough leaves Buena Vista Lake, and followed it down to Tulare Lake. The water was not so high as when we passed the year before. There was a current the same as the year before, running north. I visited it again in 1856, the next year, about January. Struck the slough opposite Tracy's, crossing about eight or nine miles north of Buena Vista Lake. There was a slough; plenty of water running in it.

Again visited it in 1868. Between 1856 and 1868 I was not there. It was March, 1868; struck a slough near Baker's Dam, south of the present North Kern River. A good deal of water was running there; a large amount of water. We crossed there by extending a rope across the slough and building a tule float. We followed the slough to a point six miles south of Tulare Lake.

Next visited the slough in 1869, in February; again visited the slough in March, 1869, and struck it near Wible's camp; was gathering cattle. The water was very high; a great deal of water in the country. We went north and followed the slough towards Tulare Lake.

Q—When did you again visit the slough?

A—I could not tell you exactly when I visited it, but I have been on the slough from that time up to the present time. I probably got back the same month. I was continually working after that time, off and on.

I have been there more or less the most of my time since, every year. I had been raising cattle, and engaged in the stock business. I was there again in the fall of 1869; plenty of water in the fall the whole length of the slough. Full of water in 1870.

Q—Have you been on Buena Vista Slough from where it leaves the lake to where it divides at the point going around Weed Island?

A—I have followed it down as far as the range line, between 27 and 28.

Q—Do you know whether the slough runs through the land belonging to the plaintiff described in the complaint?

A—Yes, sir; I have seen portions of that land run off, and I know where it is. I have been there along Buena Vista Slough when there was no water running in the channel at all.

Q—What was the condition of the channel of Buena Vista Slough from where it leaves Buena Vista Lake?

A—Well, I would have to describe it by sections.

Q—Describe it by sections.

A—Buena Vista Slough, from where it leaves Buena Vista Lake north to within half a mile of where New River runs into Buena Vista Slough, or where it did when I was last there, is a very deep slough, the same as it was when I first saw it; a very deep slough, but not so much water in it. When you get within about half a mile of the mouth of New River, where it enters Buena Vista Slough, it is different there, for a distance of two or three miles from what it was when I first knew it. It is filled with sediment and sand, grown up with willows. When we first saw it there was no timber on it. When you get still north of that point the slough becomes more as it was in former years—wide and deep.

Q—How far does that continue?

A—It continues (referring to Map 2), I should think,

from the general lay of the country, not from any actual survey—I should think there was a deep slough there for about eight or nine miles below where New River enters Buena Vista Slough. Then it branches. That is the point where it leaves Weed Island and branches.

Q—What is the condition of the slough below that?

A—It is not so deep. It is a well defined channel in the center of Weed Island, except in one place; that is at the extreme south end of Weed Island. There the banks are low, cut out considerably on each side.

Q—How far does that extend?

A—It is a very short distance. I presume it may be 20, 30 or 50 yards. I could not say.

Q—What caused that to be in that condition, if you know?

A—When I first found that country in there, the first time I went in there, there was a large drift of timber, logs and rubbish of all kinds, and it had blocked the slough up. The current striking against that drift had forced the water out on each side of the slough, and forced the water out into the channels on both sides of the swamp, and a portion of the water ran down through the center slough. Considerable water went through, but it was blocked up from where the drift pile was lodged in there for some distance down; it formed a kind of turf, or sod and tules, and it was very boggy, so that it was impossible to cross it. That was north of the timber.

Q—What was the condition of the sloughs as you saw them, with no water in them, north from Weed Island?

A—The sloughs on both sides, you have reference to, or either side?

Q—Take the main Buena Vista Slough first. What was the condition of that?

A—When there is no water in it, it is at places a

prominent slough; prominent steep banks on both sides, at other places sloping banks, at other places it extends out of the wide ground, with a depression running through and the ground rising on each side.

Q—Is that a marked channel, that you can follow through there?

A—Yes, sir.

Q—What is the condition of the slough there; the western slough, from the point where it leaves your land?

A—It is a prominent slough. I have crossed it. The slough that runs by the Tule House, into Tulare Lake, is a well defined slough. It is the easterly slough, and it is deep when it is full of water. In places the banks are well defined. Some places in a portion of the slough, the water will extend over the banks. I could not tell the number of times I have crossed New River at Tracy's crossing since I came here. I never crossed at that point but once prior to 1876, without finding water in it. That was I think in 1870, or '71. I think it remained off about a week, perhaps four or five days. I am not positive. With that single exception, I have not crossed New River at Tracy's crossing, without finding water running there.

Kern River emptied into Buena Vista Slough, in three forks, when I last saw it; it only had two when I first knew it. Nearly all of the water was in one; that was called the central channel. It was the only channel. It empties in about a quarter of a mile or perhaps half a mile of where the south channel empties into it. The water that ran in that north channel, after reaching Buena Vista Slough, always ran north; the water that ran in the South Fork, would run into Buena Vista Lake, until the lake was sufficiently raised, for the waters to flow north, and then it went and turned north, I think. But the water that ran in the

north channel into Buena Vista Slough, would run down Buena Vista Slough, without going into the lake at all. The other channel was a little fork between the main fork and the Dixon ranch, and the water that ran through that channel would run north after reaching the slough.

CROSS-EXAMINATION.

In 1871 I think that water ran down the slough from Wible's Headquarters towards Tulare Lake, about 15 miles, mostly confined to the slough. In places it was deep, and in other places it was shallow.

Q—How deep are the banks of Buena Vista Slough, from Wible's crossing down to Weed Island?

A—They are very deep from Wible's crossing down to Weed Island. I think it would average in the neighborhood of 15 feet.

Q—Is that a continuous slough or channel from Wible's Camp to Weed Island?

A—No, sir; not quite to Weed Island.

Q—How far from Wible's camp does the continuous, well defined channel extend north?

A—I think, three or four miles. For that distance, I should judge, the deepest of it, in the deep holes, would average 15 feet, and it might not be so deep. I have never seen it entirely dry there. The water, to get down that slough, now goes through the head-gate, which is 20, 30 or perhaps 50 feet from where the old levee crosses the old slough; I mean a gate to allow the water to flow through the levee. There has been no time, to my knowledge, when the canal took all of the water in the slough, and left none to go down the old slough above it. The canal has taken some of it, but I have never seen the water cut entirely off. There is a well defined channel, from Wible's, for three miles. The banks of the deepest are 10 or 15 feet deep; at the shallowest 8 to 10 feet. As you go north, it runs out,

but not entirely to nothing. It is more of a depression than a channel, where I spoke yesterday of the driftwood blocking it up. There is no driftwood there now.

Q—There is no channel to the end of that 3 miles going north?

A—Yes, sir; there is a channel; there is a channel that is cut out on both sides of the slough. It has banks; I could not tell how wide they are. The slough is wider at this low place where the water breaks out. It breaks into three sloughs. One runs on each side.

Q—Are there three well defined sloughs there?

A—In portions of the way there are; in some portions, I should think that was somewhere on Section 32. There are no perpendicular banks, but sloping banks. In some places 50 or 75 feet, and other places perhaps 200 feet wide, but not a quarter of a mile, the South Fork of the river.

Q—Isn't there a well defined channel all the way from Buena Vista Lake to Tulare Lake?

A—A channel that carries water? there is.

Q—Is there any one continuous, distinct, defined channel from Buena Vista Lake to Tulare Lake, in there?

A—I think there is; I am positive of it.

Q—Have you followed it up all of the way?

A—I have been over it.

A—Every foot of it?

A—I would not say every foot of it. I have been over every quarter section of it.

Q—You have never seen that channel that water was not running in it?

A—Yes, sir; I have seen it when water was not running in it several times.

Q—When was the first time you did that; no water flowing in it?

A—1871; the next time, I think, was in 1876; the next in 1877, and the next a portion of 1878. The water was not running clear through in 1878. It was running in the upper part of the slough in a portion of 1878.

Q—Mr. Crocker, from Weed Island to Tulare Lake, or north, how is the slough that you speak of with regard to being well developed or otherwise?

A—It is a water course or channel in places, varying in depth; a channel in places, with sloping banks, and in other places quite flat. When filled with water it will spread out; at other places it goes in confined banks.

Q—Is that one continuous slough or channel all of the way from Weed Island down to Tulare Lake?

A—Yes, sir.

Q—Are there many of them?

A—There are more than one.

Q—How many distinct channels are there from Wible's down to Tulare Lake?

A—There are two, that I consider prominent water channels, that go through.

Q—Are there two continuous water channels running all the way from Wible's down to Tulare Lake, through that swamp?

A—No, sir; there is one running down to Weed Island—only one channel until you get to the head of Weed Island.

Q—From Wible's to the head of Weed Island there is only one channel or water course through the whole swamp, the whole width of it?

A—At a low stage of water.

Q—At a high stage of water, how is it?

A—It will spread out and go through other sloughs.

Q—How many channels are there besides this one you speak of, from Wible's down to Weed Island?

A—I don't know of any regular channels. There are places where there are depressions; there is places where there is impressions—a regular slough.

In going from Wible's down to Weed Island, when the water is taken off there and the country is perfectly dry, I only found one channel from Wible's down to Weed Island, that is, to where it widens out. That, I guess, is about three miles. There it has a perfect channel, well defined banks, and rather narrow. From that point to Weed Island there are three channels. The centre channel has got more permanent banks than those on the two sides.

Q—Then the western channel is well defined, looks more like a water course than the middle channel?

A—No, sir. It carries more water than the middle one because the middle one was shut up with the drift wood, which turned the water out of it at one time. I think the water will run in this western channel before it will run in the middle one. I think I have seen water running there, but I would not be positive. The first time that I saw water running in the centre channel was in 1870 or 1871. It was then swimming. It was probably in March or April when I went in there. There was a big stream of water running in there. The stream running in that channel swam our horses. I think I was there nearly all the time. We crossed on horseback, and we got on to Weed Island. I presume we swam our horses 50 or 60 feet. There was one distinct channel in this west channel, and then we came to dry land and then found another channel, and then on dry land again, and then a third channel, three distinct running streams, one running through the centre 50 or 60 feet wide; plenty of water in it at that time. The whole country was not covered with water at that time; it might have been 1870, or, I think, 1871. The drift wood which I refer to as finding at the head of

Weed Island, I first saw in 1870 or 1871. It consisted of broken logs, 40 or 50 feet long, and some of them two feet through. They lodged in the slough on the point of that island and stopped the regular current from going through. There was some water going through the timber and still going down this slough, and kept the slough tolerably filled with water, but the current of the water was stopped. Afterwards the drift-wood disappeared, but the channel was filled up a great deal with tules and a kind of sod grown over it. But the water, after the removal, ran through that channel. The timber came from the mountains, I presume. It was pine or some kind of cedar, and I know there was some redwood. I had a ferry boat on Buena Vista Slough, at Tracy's Crossing. I think it was in 1872, but I won't be positive. The boat was 17 feet long and 8 feet wide, or about that. We used it for crossing the slough with our wagons. It was taken off down the slough, and I found it afterwards near the head of Weed Island, I suppose five or six miles from where we used it.

This ferry boat I had at Tracy's Crossing I think in 1871. I probably had it there a year. I think it was probably carried away in 1872.

R. B. Still.

First went on to Buena Vista in 1874, working with cattle for Cox & Clark, and was there in the same business in 1875, and was there again in 1877 or 1878; in fact, nearly all the time from the first of February, 1877, until January, 1878, and was there during near all the year 1878, and was there very little in 1879.

He testified that from the time he went there in 1874, up to the close of 1880 that he had crossed the slough a thousand times; crossed it on every quarter section on the ground.

Q—I will ask you if in crossing that land you found a water channel all of the distance between Tulare and Buena Vista Lakes?

A—Yes sir, I think I went on every quarter section of the swamp; that is, from Wible's Camp down. He testified that he had crossed the slough above Wible's Camp; it was a deep slough. When the water was running into the slough, we always found it running north; never saw it running any other way; that this year, 1880, he had followed the slough from near Tulare Lake up to Weed Island; all of that distance there was running water in it; above Weed Island he found the water running towards the north. It was a good big stream, different sizes in different places, and different depth. I suppose it was 60 or 80 feet wide, in places deep enough to swim.

F. A. Tracy,

Who had stock on Buena Vista Slough from 1863 to 1878 or '9, testified:

I am 51 years of age; have resided in what is now Kern County since 1863. I first came to Buena Vista Slough in 1860; I first struck the slough where it leaves Buena Vista Lake, and followed it down fifteen or twenty miles. There was an average stream of water running northwesterly; it was in the month of August.

I was again on Buena Vista Slough in 1863, in October; moved stock over here; camped about 30 or 35 miles from Tulare Lake; I remained there about a month with stock, then went 7 or 8 miles further up, south, and remained there during the winter of 1863 and 1864, and then removed up to the camp on Buena Vista Slough, 3 or 4 miles from Buena Vista Lake and northwest; camped on the east side of Buena Vista Slough; must have reached this camp about the middle of the summer of 1864. Between October, 1863, and the summer of 1864 I was along in the slough

between these two points. In the spring of 1864, the water ran down and filled up the slough, ran clear through, I think, to Tulare Lake. After reaching this camp on the east side of Buena Vista Slough in 1864, remained there until 1867 and then left again. That was my headquarters during those three years, taking care of stock cattle there. Perhaps but two months at a time, I would be off at Rodeos. I was at home, I presume, ten months out of the year. That would hold true as to the years 1864, 1865 and 1866; looking out for my stock at the time. They were running along the borders of Buena Vista Slough and back on the plains: they ranged down as far as Tulare Lake. The water was very low in 1864; in 1865 quite low, in 1866 it was full of water; in 1867 it was quite full of water. In 1864 and 1865 I was crossing the slough at different points, when the water was low. In the lower part of it I was crossing several times a day for perhaps a week, and every month for three or four months; and above I was crossing quite often after the water went down. In 1867 I also had stock in the same place. I, that year, left my camp three miles north from there, on the Goose Lake channel. It was on Section 19, T. 30 S., R. 24 E., that my camp was on, on Buena Vista Slough, during those three years. It may have been on Section 24. That is about one mile south from Wible's Camp; that is the point that has been referred to as the Old Tracy Crossing, which borders on Section 24, and was right close to my camp. I remained at this camp on Goose Lake Channel. This was in 1873. In 1874 I moved further down. In 1867 and '68 I was ranging my stock on Buena Vista Slough, on both sides, going all the distance from Tulare to Buena Vista Lake. I had stock on both sides of the slough, and I was crossing to and fro all of the while. In 1867, '68 and '69 we crossed the slough at Tracy's Crossing, down below

Weed Island, and crossed Weed Island sometimes. When the water was high we would cross in a boat, otherwise all would go to the bank and swim the horses through. We crossed below Weed Island, and when we crossed there we went on horseback. We could go across there without swimming, below Weed Island, by hunting for the shallow places. In crossing to Weed Island we always found two branches. In the east branch we would have to swim generally a little ways; on the west branch we could get through without swimming. In 1877 we could get on to Weed Island without swimming. We still found the slough there on both sides. When I was there, from 1863 to 1871, I found a current setting in the direction of Tulare Lake. I was there running my stock during the year 1872, '73, '74 and '75, crossing the sloughs during those years, from time to time. I left there about three years ago. I left the last place on Buena Vista Slough in 1874. That was my home from 1874 to 1877 to '78. I sold out my stock down there about two years ago. There was no crossing between my crossing and the crossing of Weed Island for many years. In 1877 we did cross some at the head about the west line of Section 17. There was a crossing there. Previous to that there was no crossing between my crossing and the middle of Weed Island. That would be 7 or 8 miles. That was the first crossing we had south of my crossing prior to 1877. Then we used to cross again some 10 or 15 miles below Tracy Crossing.

Q—Now, what was the condition, during those years, of Buena Vista Slough from the point where it left the lake, for the first 20 miles down the slough, between 1863 and 1877 and '78?

A—*From* 1863, *up to* 1877 *and* '78, *there was an open channel of water running down there.*

Q—*How far from the lake was that an open channel, from* 1863 *to* 1867 *and* '68*?*

A—*It was an open channel down to the center of Weed Island, and through Weed Island was an open channel.*

Mr. GARBER. Q—An open channel down through the center of Weed Island?

A—Down to Weed Island. Through it there was a channel, but it was not well opened through it.

Q—What is that?

A—It was not very well opened. There were some obstructions in there of flags that had grown up in the channel at the head of it. I mean at the head of Weed Island. That would be down about 8 miles from the crossing, and 13 or 14 miles from Buena Vista Lake. I think we went down about 12 miles from Buena Vista Lake before we came to where the slough divided and ran around Weed Island.

Q—Well, what was the condition of these sloughs after they divided at the head of Weed Island, and down to the range line between Townships 28 and 29?

A—Well, from the head of Weed Island, up to 1868, the channel ran more directly through the land. After 1868 it divided almost entirely there at the head of the island. It spread out on each side of the island in 1868. It washed out a channel to the right and left more. Prior to 1868 more water, a great deal more, went through the island than afterwards; and between 1863 and 1868 from the lower end of Weed Island the water ran along in a wide channel, most of it.

Q—How wide would that channel average between those township lines. We refer to between 28 and 29, in the lower end of Weed Island?

A—At a low stage of water it might not be more than 100 feet wide on an average.

Q—How wide would it be, on the average, before it would overflow?

A—Oh, well, it would be of different widths; it might run a rod wide in some places and ten rods in others. Take the Buena Vista Slough channel, between the

lake where it left the lake and my crossing, between 1863 and 1868, would average from 50 to 100 feet wide; and running from there down through Weed Island it would average much the same; from my crossing or Tracy's crossing down two or three miles it would average 50 to 100 feet; and then, perhaps, it was not as wide for two or three miles more. From the head of Weed Island a portion of the water would go around in the other two channels that we struck east and west of Weed Island. After these channels passed Weed Island they connected again with the main channel.

He, the witness, then goes on and describes the channel from the Township line between 27 and 28 to Tulare Lake.

Q—Now, Mr. Tracy, you have given the description of Buena Vista Slough, and the sloughs where the diversion takes place, from where it leaves Buena Vista Lake and Tulare Lake, as they existed from 1863 to 1868. Has there been any change, or material change in the sloughs since that time?

A—I think not, none that I remember of.

Q—What was the condition of these sloughs when you saw them from 1863 to 1868, as compared to the last time you saw them?

A—There was no material change from the slough to the head of Weed Island in all those years. From where the sloughs come together, after leaving Weed Island, there was no change that I know of in all those years.

Q—You say there was no change below that point, was there any change above?

A—The water rushed out the channel that ran through Weed Island, in 1868, on both sides, more than it had before.

Q—What caused that, do you know?

A—Well, I think one cause was the filling up of the centre channel somewhat.

Q—Do you know what caused that channel to fill up?

A—There was a very great flood at that time, and some drift came down into it.

Q—I understand you to say, when you first came here in 1863, that the waters of Kern River were running through what was known as Old River, into the channel, connecting Kern and Buena Vista Lakes?

A—Yes, sir; they divided there.

Q—Then the waters would go in where?

A—Into Buena Vista Lake.

Q—And from Buena Vista Lake?

A—Into Buena Vista Slough.

Q—And running through Buena Vista Slough, where would they run to?

A—Into Tulare Lake, and would run from there on through Tulare Lake, and into the San Joaquin.

Q—Was there any change as to where the Kern River would discharge by reason of the flood of 1868? Would that change in the river, make any change as to where the waters of Kern River would eventually discharge?

A—No. It would make no change eventually, in where that would eventually discharge.

I used to have a boat on Buena Vista Lake, and went down Buena Vista channel in a boat, some distance, but not quite as far as Weed Island. I have been down six or seven miles from my camp on the bank, and also on the slough above my camp, up as far as the lake. I own land along Buena Vista Slough.

CROSS-EXAMINATION.

There is what we considered a main channel, from Wible's Camp down to Tulare Lake. Some tules grew in that channel, but flags generally. Flags will grow in the water. We used to trace the channel some

by the flags. They seemed to grow better in the water than the round tules. That is what I regard the main channel. There were other channels diverted from the main channel, and entered it again, etc.

J. M. Lewis.

I first came to Buena Vista Slough in 1862, driving stock and horses. I visited the slough again the next year, in 1863, in the spring time, with cattle; was there again in 1866 with cattle; was there again in 1871, in April, gathering cattle; and was there again in 1876 gathering cattle; and in 1877 was there most all the year pumping and attending to cattle. In 1878 I was there often, once a week, looking after stock and branding cattle, being down Buena Vista Slough all these years between Tulare and Buena Vista lakes. I was there again in 1878 a number of times, pumping and looking out for cattle.

Q—What has been the condition of the channel that runs along through the body of swamp lands at Buena Vista Slough, running along this body of land, since you have known it, from Goose Lake to Tulare Lake?

A—Generally it has been confined pretty well to the channel all of the way down.

Q—What is about the average width of it?

A—I suppose from 80 to 150 to 200 feet. The average depth I could not tell you. Perhaps it would be six feet; perhaps seven. When the water has been running down the channel during those years, there has been a current always setting north towards Tulare Lake. I have been on the channel above Goose Lake as high as Tracy's Crossing, and crossed it back and forth. I cannot tell how many times I have crossed it. I have crossed it at a great many different points. I have crossed it a great many thousand feet, I believe; I presume at every section of land there is between

Goose Lake and Tulare Lake; on every half section and quarter section.

Q—What is the nature of the channel where you crossed it above and between Goose Lake and Weed Island, or Tracy's Crossing?

A—It seems to be mostly confined to the channel. I have noticed, wherever I have crossed it, it seemed to be a deep channel—confined channel; it seemed to be a well defined channel where I crossed it. There are two channels between Goose Lake and Tulare Lake.

THOMAS L. BRIGGS.

Forty-two years old. First visited Buena Vista Slough in 1864, in the spring; brought a drove of cattle over there that year. Visited the slough next in 1866, getting up cattle; next visited the slough in 1874, gathering cattle. Next went to the slough again in the spring of 1875, gathering cattle; was there again in the spring of 1876, gathering cattle. In 1877 I was there again pretty nearly all the time. I was there in 1878, in 1880, and in 1881, gathering up cattle.

Q—Now, Mr. Briggs, from the time you went on that slough in 1864, until this year, when you have been passing up and down the slough, crossing it, what have you found in that slough in the way of a channel to carry water?

A—I found it a very well defined channel between Buena Vista Lake and Tulare Lake—that distance between those two lakes.

Q—Is there a channel defined there that would carry water?

A—Yes, sir.

Q—How deep is that channel upon the average?

A—From 4 to 20 feet deep—various depths.

Q—How wide?

A—From 20 yards to 100 yards, in places. When I

have been there, and there has been water in the slough, running, it has been running north; always in that direction.

CROSS-EXAMINATION.

Q—Did you ever follow directly on the line of the main channel from Buena Vista Lake to Tulare Lake?

A—I have, for some distance, but not the whole distance. I call the main channel the one on the east side. It is a well-defined channel. It runs on the east side of Weed Island, what I call the main channel. I have not been to Weed Island very lately. I was there last in 1880. The channel was there, and the same as before.

The channel in 1880 was the same as when I first became acquainted with it, in all respects, to the best of my knowledge. When I crossed the swamp, directly across Weed Island, I would find two channels, one on the east, which is the main channel, and the other on the west. These two channels formed Weed Island. Those channels around Weed Island have not well-defined banks in all places. The banks are sloping. You can always find the banks, and know exactly and precisely where the banks are. I can follow that slough from Tulare Lake to the head of Goose Lake, and can follow the bed of the slough going south from a point west of Goose Lake to Buena Vista Lake. I have never done it, but I have been on all parts of it, and I think I can do it.

C. W. CLARKE.

Am of the firm of Cox & Clarke, cattle-raiser of Sacramento. First visited Buena Vista Slough in May or June, 1865; was gathering cattle. Had cattle on Buena Vista Slough prior to that time. First came to the slough near Tulare Lake, and worked all of the way up the slough to Tracy's Crossing. It was per-

fectly dry. I was there again in 1865 and 1866, and in 1867, and in 1868, and in 1869, and again in 1873, in 1874, in 1875, and in 1876.

Mr. J. M. Lewis, the witness last on the stand, was my foreman, down there. In 1865 we went up to Tracy's. The water was standing in holes. The water course was then dried up, with the exception of a few low places.

Q—What was the condition of that water channel that you followed up from Goose Lake to Tracy's Crossing; what was the width of it?

A — The channel was very plain; no trouble about a man following it up. I suppose in places where it was confined it was from 75 to 100 feet. In other places it would spread out 100 to 200 feet. I also followed that slough from below the Tule House, up to Goose Lake; took our horses and traveled along up it. It averaged 75 or 80 feet, I should judge, and pretty well defined—that twelve miles—good hard banks; and the slough was well defined from the Tule House going north.

WILLIAM CANFIELD.

Came to Kern County in 1864 with cattle; was a partner of the witness Tracy; came with him, and afterwards moved with him up to the camp at Tracy's Crossing; lived with Tracy until 1874, and was working with cattle up and down the slough; was crossing the slough from time to time in 1867 in a boat.

Testifies generally to the condition of Buena Vista Slough, and that a portion of the water that ran from Kern River into Buena Vista Slough, prior to 1876, ran northward and down Buena Vista Slough, a portion running into the lakes until they were full, and then afterwards running out and down Buena Vista Slough.

GEORGE RACINE.

I am a stock-raiser, and have been engaged in the business for 22 years. First came to Buena Vista Slough in 1859; at that time water flowing in it north. Was there again in 1863; drove cattle through; was there again in 1864 and 1865 with cattle; and in 1867 and in 1868, and every year thereafter up to and including 1877. I was not there in 1878, but was in 1879, 1880 and 1881; during all of this time with cattle; ranched them up and down, down Buena Vista Slough from Tulare to Buena Vista Lake, crossing the slough every year. I cannot say how many different points I have crossed the slough running through that swamp and overflowed land during the time I have been on it.

Q—Do you suppose you have been on every section of land that it runs through?

A—Very nearly, I think.

Q—What kind of a channel is it that runs down through that body of swamp and overflowed land from Buena Vista Lake to Tulare Lake?

A—It is a well defined channel.

Q—How deep upon an average?

A—I cannot say how deep. In places where there are steep banks, such as there is from Buena Vista Lake down to Norton's Camp, or at the Wible Camp, some places there it would be eight or ten feet deep, the banks, and in some places less. Some places below, before we got to Weed Island, was very steep banks, eight or ten feet high. Then you came to the banks that are sloping banks, and the water would not be over five or six feet. In some places it would be fifteen to twenty feet deep. It runs on in that way clear through.

From Goose Lake to Tulare Lake there are two channels. The east channel is from three to ten feet, and in places fifteen feet deep. It is from 80 to 100

feet wide. The west channel, parts of it, are larger. It averages about the same, I think.

JESSE DOVER.

I have lived on Buena Vista Slough since 1876, at what is known as Dover's hog camp, fifteen or sixteen miles below Wible's Camp, on Sec. 1, T. 29, R. 22. I went there in July, 1876, to raise hogs, and have been in the hog business ever since; run my hogs around on Buena Vista Slough, between the Adobe Holes and Weed Island. In going through that body of swamp land, I became acquainted with the sloughs or channels that run down through that land for a distance of fifteen or twenty miles north and south from my camp. Through that distance, in some places, the channel is a fine slough, and in other places not so deep. In some places there is but one slough, and in other places there are three. The slough, for some seven or eight miles below my camp, would average sixty or eighty feet wide, and three to ten feet deep; some places three and other places ten feet deep. I could not say, positively, that I have been on every section of land, but I am in that swamp every day that I am at home, and if there is a spot that I have not been on I don't know it. If water is turned down Buena Vista Slough there are places where it might back around three hundred yards before it would get through.

J. PENSINGER.

I have resided on the channel of New River since 1873; was first on Buena Vista Slough in 1872; saw a ferry boat there. It was in December, 1872. It was sixteen or seventeen feet long, and six or seven feet wide, a kind of a scow. I hauled it out of the slough with my mules, cleaned it, calked it, and then started down the slough.

Q—How far down the slough did you get with the boat?

A—I don't know exactly; five or six or maybe eight miles; I started from between Tracy's Crossing and camp; that was in December, 1872. After going down six or eight miles, I tied the boat up and left it there; did not take it back; the current was so strong I could not tow it back. I did not go any further down the slough at that time. I was below that point on the slough in 1874. I think twenty or thirty miles below Tracy's Crossing. I was there again in 1874, in July. The water was then mostly confined to the sloughs; had to swim them. Have been on Buena Vista Slough frequently since. Have crossed it several times, at Weed Island, I could not tell the year; since 1874.

CROSS-EXAMINATION.

I have crossed it at several places; crossed it where Wible's Camp is, and crossed it at Weed Island, and higher up.

M. ROGERS,

Resident at Linn Valley, in the mountains, 25 miles from Bakersfield.

I first came to Kern County in 1858, and went to Buena Vista Slough hunting. It was in September. I was there again in November, 1858; struck the slough at Wible's Camp. It was deep; plenty of water was running at that time north toward Tulare Lake. I went to the slough again in 1863, moving cattle there. I went there again later in 1863 with cattle. I was there again the next year, and again in 1864 and in 1865, '66 and '67, working cattle along the slough between Tulare and Buena Vista lakes, and crossing the slough. I went there again in 1874; passed there; did not stop. I was there again in 1877 or 1878, and in 1880 and '81, with cattle, and between the two lakes.

Q—When you had been down there during these numerous years, and crossing this slough from time to time, what has been the average width of the slough that you have crossed?

A—Well, I should think from sixty to ninety feet. I cannot tell exactly, but I would put it at about that width.

Q—How deep would it be on the average?

A—I don't know. There are places where it was deeper than others, but take it the length of the slough I should think it was from five to six feet. When I have seen the water running in the slough, it has always been running north. I never saw it running the other way.

CROSS-EXAMINATION.

The channel I refer to as being five or six feet deep, lies between Goose Lake and the Tule House. I have crossed other parts of the slough in various places. In some places it is deep and in other places it is shallow. I have seen the water running down it, and when the water is not running a person can see the channel by the places in the tules where the water has run down, and the tules have not grown up. I have traced out channels, that is, along through there where the water was. I have hunted shallow places to cross it when the water has been up. I never traced out a continuous main channel from Wible's Camp to the Tulare Lake. I have traced the channel from Goose Lake to the Tule House, a continuous channel there. In passing through there when the water was up, I have found that it was running a pretty swift current. Some places it would be two or three or four feet deep; in other places it would be shallow. There are places there where I have crossed what we would call the main channel, where the main current of the water ran, and probably it would not be more than from two to three feet deep.

T. W. Barnes.

I first came to Kern County in 1861. I resided on Kern Lake in 1863. I reside at Canfield, and have resided there ever since 1864, and was on Kern and Buena Vista lakes.

Q—During the years between 1863 and 1868 where did the water go to after passing into Buena Vista Lake?

A—Down into Buena Vista Slough and in the direction of Tulare Lake. I was in Buena Vista Slough first in February, 1863. It was then quite a large stream nearly from bank to bank. In low places it was running over. It was running toward the north. At that time I followed Buena Vista Slough about ten miles below Tracy's Crossing; ten or twelve miles, to about opposite Weed Island. I was working then with my hogs. I was on Buena Vista Slough again in 1864, on the same business. In 1863 I was there from February until May, or the latter part of April. Then, after that, I was there every three or four weeks during 1863. I went on to Buena Vista Slough again in May, 1864. I don't know how long I was there, but off and on every week or two. I don't think there was any month that I was not on the slough. I was there again in 1865, taking care of hogs, from the lower end of Buena Vista Lake down to about Weed Island. I was on the slough a good many times during that summer. I was there again in 1866, in the same place. I was there again in 1867, at different times in the spring; still had my hogs there. I was there again in 1868 and in 1869, and in 1870 and 1871, still having my hogs there, at the same points, down as low as Weed Island. I was there in 1872 down to the same point, Weed Island. During those years, crossing to Weed Island, the deepest place I found was breast high. In 1866, when I crossed, it was shoulder high.

I also crossed to Weed Island in 1872, when there was a great deal of water. I found water three feet deep in going to the island. I was on the island in 1873. In 1877 I was crossing the slough every eight or ten days, going to camp with freight; the slough was dry. I was there in 1878, '79 and '80. I could not tell at how many points between Tracy's Crossing and Goose Lake I have crossed Buena Vista Slough, going in there as I have for so many years. I have crossed at the canal camp at the upper end of Weed Island. I have crossed the sloughs going north of Weed Island and alongside of Weed Island on both sides, clear across the swamp on the De Weber road.

Q—When you have made these crossings and the water was running in the creek, how deep did you find the water?

A—I never measured the water in the channel; I never measured the depth of it, but it was deeper than I wanted to go through. I have found the sloughs swimming, and I have found them dried down to holes. When the water was running full it would swim almost anything.

Q—Going across the slough when the water was running there, how far did you usually have to swim; how wide did you find the channel?

A—That would be rather hard for me to say. A man riding along, going with his team, hardly ever thinks about the question being asked him how far the channel is. I suppose the widest channel there is 60 to 100 feet wide, opposite Weed Island; may be more, may be less. I will not say exactly the exact width of it, because I never expected the question to be asked me.

Q—What is the nature and condition of that channel when you have crossed it and followed it along there; where it leaves Buena Vista Slough at the head of Weed Island?

A—Well, it is a well defined channel down to the head of Weed Island. There the channel was choked up in 1868--1867-68; that was overflowed by logs and drift, the channel choked up there. That drift was right at the upper end of Weed Island. It consisted of pine, redwood and spruce, such as grows on the Sierra Nevada, driven in there by the overflow of 1867-68, the same as thousands of other drifts in the river here. I saw logs in there when I first found it, probably two feet in diameter and of various lengths. Before the drift formed there the main channel ran right along by Weed Island; along there.

Q—After the drift, where did the main channel run?

A—It broke off with two separate streams; one to the east and one to the west, and washed off to the low ground.

Q—What was the condition of those channels from the head of Weed Island down to Goose Lake, where you have been in there?

A—I have found the channels nearly every place I crossed it. I never followed the channel from there to Goose Lake directly along the channel, but I have struck the channel at different places. But I have found water running there, running north, to the west of north.

Q—How wide would the channel from Buena Vista Lake to the head of Weed Island, average?

A—Well, I don't know. It is only a supposition with me. I have never measured them, but I should say it was two hundred feet wide. I think the water in there is twenty feet deep when it is full, or sixteen or eighteen, from that down to four or five feet. There is a place that I am satisfied, when it is bank full, it would be twenty feet, when running over the banks.

Q—What was the average width of the channel you have spoken of below the head of Weed Island, and down to Goose Lake?

A—The main channel there opposite Weed Island, I think, is all of one hundred feet wide, and probably more, I cannot recollect positively, because I have never measured it. I have seen the crossing, and have crossed it when I had no team; crossed it when it was dry. I know it was a good deal larger than my pole and wagon and all, when I had a long hay frame on my wagon, hauling hay.

Q—How deep was the water there in that channel when it was running, when it was full?

A—Well, various depths; like all streams, shallow and deep; there are places a great deal deeper than others, but deep enough to swim a horse when even bank full.

Q—Well, between the years 1863 and 1879, how many years have you seen the water discharged from Buena Vista Lake into Buena Vista Slough?

A—Every year it would proceed down the slough; that was the only outlet.

CROSS-EXAMINATION.

In Buena Vista Slough there are shallow places, as in all streams; now Kern River spreads out all over the country, at a high period of water.

Q—Didn't the water, whenever you found the channel full, as you call it, would not the water be generally spread out in the tules?

A—Spreading out over the low lands, of course, the same as any other stream—the same as Kern River. It does not go out until it is full to the top of the banks.

Q—Then you don't know whether the channel is a defined and marked channel?

A—Clear to Tulare Lake? I don't know.

Q—Or clear to Goose Lake?

A—At the head of Weed Island, at Goose Lake, I went across it, and, as I stated, at different points. I

never followed the channel from Weed Island to Goose Lake.

Q—Then you don't know whether there is a channel there?

A—There is a channel there, but I never followed it clear through. I have crossed it at different points. I have seen more than one channel there. I have never seen the water running from Tulare Lake back into Buena Vista Slough, but I have seen it run from Buena Vista Slough the other way, and towards Tulare Lake. In all of the rising of the water you will see it running to the north. Since I have known Buena Vista Slough I suppose it has always got the major part of its supply of water from Kern River, that is the main part of the water that empties into that slough and into the lake. I have found always that Kern River carries its waters into Buena Vista Lake, Kern Lake, and into the slough, those three points.

Q—Where is the first place that the water comes from that goes into Buena Vista Slough at the present time?

A—It comes from Kern River. At the present time it gets its water from Kern River. At the present time the old South Fork empties into the slough, and follows the slough up into the lake.

Q—Hasn't it got its supply of water from Buena Vista Lake?

A—Well, when the water ran into Buena Vista Lake and Kern Lake, of course when the lakes were full, it ran down Buena Vista Slough.

RE-DIRECT EXAMINATION.

Q—At any other time, when these lakes were filled, Kern and Buena Vista, the waters would run out down through Buena Vista Slough? The waters would run out down through Buena Vista Slough?

A—They would run down all through Buena Vista Slough. There is no other resource that I know of.

Buena Vista Slough when full and overflowing, would overflow its banks in low places, the same as Kern River. I have seen Kern River during floods, when it would overflow the whole valley, very nearly. Take the usual spring freshet, along the New River, when the waters were running down from the melting snows, the river will overflow its banks at low places. That is so every season, when there comes a spring rise. In places it will spread out and get over its banks, low banks.

CHARLES D. GIBBS.

I am a civil engineer who surveyed lands around Buena Vista Lake, as a Deputy United States Surveyor, in 1853 and '54.

He testified that he crossed Buena Vista Slough in 1854, five or six miles north of Buena Vista Lake. Buena Vista Slough was bank full where he crossed it.

I should judge it was one hundred feet wide, and the water running north. There was a good, strong current. It was in May, about the 23d or 24th.

In connection with the survey, he again struck the township line between Townships 26 and 27, Range 22; and that in his field notes he made the entry as water running there, and running north; and in his notes he refers to two sloughs, or two streams of water; the first two hundred links wide, three and a half deep; and the second four hundred feet wide and five feet deep; course north.

And the witness locates the slough on plaintiffs' map, Exhibit 3.

Q—It would come right where the most easterly slough runs through that Section 4, would it?

A—Yes, sir; but what this slough can be I don't know. The water was five feet deep, and it passed

through the north line of Section 4; the most westerly branch of it.

The witness locates the second slough which he struck at the same point where it is located on McCray's map, Exhibit 3.

The witness also found another slough on the Township line between 27 and 28 South, Range 22, and locates it on plaintiffs' map, Exhibit 3, which again corresponds with the map of McCray as regards the location of Buena Vista Slough at that point.

At this point thirteen Government plats are offered in evidence of surveys made by United States Deputy Surveyors in 1854–1855, and among them are the townships through which Buena Vista Slough runs before reaching the body of swamp and overflowed land, and through such townships appears the channel of Buena Vista Slough, running from Buena Vista Lake down to such swamp and overflowed land, or the point where the Government survey stopped, and at the points where the slough crosses the township or section lines, the width of the slough at such points is given, and the course which the water runs from the slough is indicated in the usual manner in which the course of a flowing stream is indicated on such map or diagram, by an arrow head pointing down stream.

The width of Buena Vista Slough at the different points crossing Section lines is given on the Government plats as follows:

On the plat of Township 31 South, Range 25 East, the width of Buena Vista Slough (Lake Slough), is given as follows;

Where it leaves Buena Vista Lake on the south line of Section 8, 4.90 chains (or 324 feet).

Where it crosses the north line of Section 8, 3.17 chains (or 210 feet).

Where it crosses the north line of Section 5 and Township, 4.12 chains (or 272 feet).

Where it crosses the west line of Section 32, in Township 30 South, Range 25 East, 3.18 chains (or 211 feet).

And passing out of this township at the corner of Sections 19 and 30, or at the same point at which the slough is located by both Macmurdo and McCray.

Both the plats and field notes of said townships give the course of the slough as northwest, or towards Tulare Lake.

PROFESSOR GEORGE DAVIDSON.

Testified generally as to the water system of California, and the source and course of Kern River, giving its source as the Sierra Nevada, and its course as running down through, or near Bakersfield, and into Buena Vista Slough, on the west side of the valley, and then after entering Buena Vista Slough, running northwest in the direction of Tulare Lake, through what is designated as a trough in the valley, and a line of drainage through the valley; that the various rivers of this valley all go through that trough.

The witness also testified that he had recently visited Buena Vista Slough, at the point where Kern River emptied into it, the South Fork of the river, and had taken measurements of the water running northward and southward from that point; and he found three hundred cubic feet per second, running northwest towards Tulare Lake, and four hundred cubic feet per second passing southward towards Buena Vista Lake. And he gives the elevations of Kern and Buena Vista lakes, as two hundred and ninety feet above the level of the sea.

Q—When Kern and Buena Vista lakes are filled by this flow of water from Kern River, through Buena Vista Slough; filled to have full banks, where will the water then flow?

A—The water will then flow to the north-northwest and if there was a supply, it would increase the height. But if the supply north was decreased, it would then afford the means of draining the lakes and all go to the north-northwest.

Q—Is there any other outlet there that you know of except to the north-northwest from Buena Vista Slough?

A—No, sir; the difference between Buena Vista Lake and Tulare Lake is nearly one hundred feet. The flow of the water from this Kern River Valley is west-southwest, until it reaches these two lakes, or connecting streams, then the flow of the water is north-northwest.

Q—Do you know of any other source of supply that the Kern or Buena Vista lakes have, other than Kern River?

A—I do not, that is, in wet seasons there might be a small amount supplied from San Emedio cañon, from Tejon cañon, and from Tehachepi.

The distance from Buena Vista Lake to Tulare lake is fifty-two or fifty-three miles in a straight line.

CROSS-EXAMINATION.

There are no other visible sources of supply to Kern and Buena Vista lakes, other than Kern River. I have been around the lakes. I have gone around them, and on Kern Lake, and I have been on the further side of Buena Vista Lake, and I say there are no other sources of supply that amount to anything. There are no other visible sources of supply that have any comparison at all with Kern River in amount.

MILTON NORTON.

I reside in Buena Vista Slough, about a mile and a half below Headquarter's camp, or Wible's camp, on Section 15, T. 30, S., R. 24 E. I have resided there

for two years last fall. I am engaged in running hogs there, and in farming some; I am cultivating that land there, a part of Section 10 in the same township. I think it is the southwest quarter.

I have been acquainted with Buena Vista Slough since 1875. During 1875 I crossed it three or four times during the month. I was on the slough in 1876, crossing backwards and forwards, going to the Templor. In 1876 we generally crossed at the Tracy Crossing. In 1877 I was in the swamp along the Buena Vista Slough. I first located about three miles above Dover's camp, on the west side of the slough, at what is called Smith's Pump. I commenced to pump there in June, 1877, and continued until March, 1878. I attended to the pumping and pulling cattle out of the mud-holes. During that time, between June, 1877, and March, 1878, I was along that part of the slough, pulling out cattle, from Wible's camp down about twenty miles, to a point called the Fish Pond.

Q—How often, Mr. Norton, would you be along the slough during those months ?

A—Probably crossed them from one to ten times a day. I think I was there all of the time. I had to go to all of the different camps. I was not on the slough for five or six months after March, 1878. I went back in August, 1878. I then located where I am now living. My business since August, 1878, has been raising hogs and farming some.

Q—Where have you been running your hogs—between what points on the slough ?

A—Well, they ran from Wible's down to the lower end of Weed Island, probably three-quarters of a mile below Bonestell's.

Q—Do you know what was the condition of Buena Vista Slough between the place where it leaves

Buena Vista Lake, and the place where you have been running your hogs—three-quarters of a mile or a mile below Bonestell's—when you first saw it?

A—When I first crossed it it was dry, except in holes.

Q—Well, what was the dimensions? What was the average width of that slough between those points when you first saw it?

A—I think it would average a hundred and twenty feet wide, and will average between twelve or fifteen feet deep.

Q—What kind of banks has it during that distance?

A—Well, the banks for most of the distance are steep, and only at places you can cross.

Q—How did you cross that slough between Bonestell's house and Tracy's Crossing, when you desired to cross it, when it was full of water?

A—When it was full of water we generally have to swim it. It is a very difficult stream to cross.

Q—How near does that slough run to your house?

A—It runs within fifty feet of the house. The slough is there; there is no change in the bed of the slough at that point since I went there.

Q—Does the slough run through the land that you are on there—the west half of Section 10?

A—Yes, sir. I don't know as I can describe where it runs through Section 10; it crosses the southwest quarter and crosses the line. We built a fence on the line. It runs north and south, and we had to cross the slough several times. The slough also crosses the northwest quarter of Section 10. I have seen the slough between Buena Vista Lake and the Bonestell house when it was dry, all except the water holes. Water holes don't dry up. At such times it would be six feet down to the bed of the slough.

Q—I mean how much water would you have to run

above the bed of the slough when it is dry before the slough would overflow its banks?

A—I could not tell exactly; I think about six feet, though. I have been along the banks of that slough recently—in fact, last Thursday. I first struck the slough then at the Bonestell house, and followed it up to where I lived. I judge that would be about eight miles along the slough. There was water in the slough when I followed it. It was running in the slough, I think, about three feet deep. It was not overflowing its banks at any place. I went along on horseback; kept right along on the side of the slough all of the time. I did not cross it between the Bonestell house and the camp. The slough was at that time about the same as when I first saw it. The water was at that time running in the slough below the Bonestell house about a mile. I have been down Buena Vista Slough in a boat, from Wible's Camp north on the slough, probably three and a half miles, following the slough. Last February, when the water was in the slough, I followed the slough from near my house down to a point below Dover's. The narrowest place we found in the slough must have been fifty feet. There might have been a point below the drift pile, where there are different channels, where it was narrower, but in the two or three different channels, taking them altogether, there was no less than fifty feet. At this drift pile, where the stream divides, the west channel is the widest. It is probably one hundred and fifty feet. All of the channels come together except one. The one on the west side runs down a considerable distance below. It may come in again below, but I don't know. The other two channels come together probably a mile below. I have been on this west channel from where it leaves the main channel down to a point near Dover's when the water was running out. It would probably average one hundred feet wide, and in some places

more. I should judge that three feet of water would run through it on an average before it would overflow its banks. I have been on Buena Vista Slough where Kern River enters into it, abreast of the point where Buena Vista Lake strikes the slough. The water that runs into the slough from the northerly branch of Kern River, after entering the slough, runs north-northwest down the slough. The water that runs into the slough from the southerly branch divides; a part runs into Buena Vista Lake and a part runs down the slough. I was first at that point where those two branches enter at in 1875 and 1876, I should say, and have been there frequently since, and every time that I have found water running from the north branch that water has run north-northwest after entering the slough; never saw it running in any other direction. I am working for myself.

Q—How many places are there in Buena Vista Slough between the old Tracy Crossing and Bonestel's house, that you can cross the slough when it is bank full?

A—Well, if we want to swim we can cross most any place, except down below the drift pile there.

Q—How many places are there when it is bank full, that you can cross it without swimming?

A—Well, sir, I should think there would be one place, probably, within a mile of the Bonestell house, a mile south. I have crossed the slough at the Bonestell house within a month. The first time I crossed there I don't think the water was running. We crossed there this year when the water was running, and the water was between three and four feet deep. That was in February or March. At that time the slough was not overflowing its banks. When the slough gets high, it runs out in different channels. When the slough gets about so high, it will run around in the different channels, and come back into the slough again.

Q—How high would the water have to get before it would flow out from the main channel into this side slough that you speak of?

A—Between three and five feet, I guess, and when the water recedes and the water is only two or three feet in the main slough, the water in the side slough would run out of them again into the main slough. The main slough would drain out the side sloughs.

CROSS-EXAMINATION.

The water divides in the main slough at a point probably one mile southerly from Weed Island, at what I call the drift pile. At the drift pile there is not much difference in the depth of the channels. They are all about the same depth there. The water has got to rise up a little before it will run out on the west side. It has got to rise in the main channel. I think it will have to rise three or four feet before it will go in the west channel. I think the width of the mouth of the west channel is about one hundred and twenty-five feet. The banks are sloping. It is probably three or four feet in the centre, and slopes back to nothing. If there was no water in it you could find it, because it looks like a water-course. I should describe it as being from three to four feet deep in the centre, and the banks sloping, probably, back one hundred and twenty-five feet. I cannot say exactly how far it slopes. The banks slope back sixty-two and a half feet from the centre, and rise three and a half feet, I think. The main slough has steeper banks. You will find this slough the same as you will find any other slough, or water course, or river. You could find it as well as you could find Tule River, or any other. It differs in one respect from the surrounding country, that you would not see so many tules growing there, and in some places there are steep banks that show that water has been going through, and it looks like a chan-

nel. The channel that runs to the east from this drift wood is from three to five feet deep, and some places more, and it continues for one mile, I think. It is well defined, this westerly channel, where it leaves the drift wood—it looks like a slough. It has higher banks than the other slough. I should judge from four to six feet high, but not exactly perpendicular. They slope a little, at an angle of thirty-five degrees, I should guess. Of the three sloughs at that point I could not tell which is the main slough, the centre, the east or the west. The water, I think, would either take the middle one or the north one ; that is, the one to the right as you go down, first. Last Thursday it was running in both of them. It was not running in the west channel at all on Thursday. The water was confined to the channel at Bonestell's ; no water running out on the west side at all. There was no water spread out on the west side of the channel at all, at the Bonestell House. There may have been a little on the east side. I did not cross the slough there. I followed the slough right up on the west side. The main channel is well defined. I call the main channel the one that runs down to the Bonestell House, that is, the middle channel. There is a channel on the east side of the swamp, and a channel on the west side. I call the middle one the main channel ; that is better defined than the eastern or western channels. The three channels come together at the drift pile. From the drift pile there are three channels. They come together again about a mile from there, except the west channel. I could not tell exactly how wide the west channel is at that divide, probably fifty or one hundred feet, may be more. The bank is not perpendicular ; probably in going twenty feet you would come to the bank from the bottom.

Q—Well, now, during your following that middle

channel down below the Bonestell place, how far before it ends?

A—Well, I cannot tell how far before it ends.

Q—How far did you go down it?

A—The water was running down about a mile below Bonestell's place last Thursday. That is a little east, or northeast of the end of Weed Island, very near the end. The Bonestell House is between the main branch and the western channel. There was no water in the western channel at all. At the point where the water ceased running on Thursday, it was ten feet wide, and back one hundred feet further southward from where the water ended, it was seventy-five feet wide. The eastern branch comes into the central branch at the south end of Weed Island, there the waters of the two branches join, about one mile below the drift pile. They were joined on last Thursday when I saw them.

RE-DIRECT EXAMINATION.

I should judge that the eastern channel and the main channel ran in separate channels about a mile. They came together three or four miles above Bonestell's.

ROBERT BURGAN.

I reside in Kern County, on Panama Ranch, southwest from Bakersfield. I have been on Buena Vista Slough; I went there first in the spring of 1875. I was at work up and down in the swamp once or twice in the spring. I was there about one month each time, working with cattle. I was there in the fall of 1875, the same length of time; I was working from the head of Tulare Lake to Tracy's Crossing, crossing the slough at different times; sometimes I would cross it once or twice. I worked backwards and forwards. I crossed it a dozen times during the season of 1875, 8 or 10 times. I was there again in 1876 with stock; from early in the spring, some time in June; I was there

most all the time, about four months. I was there again in 1879; I think I got there in March, working cattle from Tulare Lake to Tracy's Crossing, and crossing the slough quite a number of times that year; mostly at the Tule House. Pumps were put in; seven, I think. I had five put in, working for Mr. Crocker. I was there, and away from there, pretty much all of the time during the winter; and lately a few times backwards and forwards. I was there in the year 1880, running one or two pumps, gathering stock, and branding cattle. I was working cattle between Tulare Lake and Tracy's Crossing; crossed the slough a number of times, working for Mr. Crocker. I don't think the water ran down any further that year than Dover's; it may have run to the Adobe Holes; I am not positive, because I was not there all the time.

Q—Have you ever seen the water running all of the distance from Buena Vista Lake to Tulare Lake?

A—I think I have in 1876. I didn't see it running all of the way; but I saw it wherever I was on the slough, running, and I suppose I saw that slough at 50 or 100 different places. When I cross there I always find sloughs. That year it was always swimming when I found it and when I crossed it. The water was running north.

Q—What is the average size of that slough, the main slough from Tracy's Crossing down to the Tule House?

A—It would average eighty or one hundred feet; and generally where I made my crossing it was six feet deep. The lowest place that I have been on the slough would be two feet; that would be the shallowest place on the slough, in the channel. When the sloughs were running full of water, and the water is confined to them, we could feed our cattle over all but one-sixth of the land.

No cross-examination.

S. W. WIBLE.

I am Superintendent of the Kern Valley Water Co. I reside now at the headquarters of that Company, and have lived there since the fall of 1876. In the fall of 1876 considerable water was running in Buena Vista Slough. At that time the water was running into Buena Vista Slough from Kern River in three different branches. I have been on Buena Vista Slough all of the way from Old Tracy's Crossing down to Tulare Lake, two or three or four times.

Q—How many times have you been down Buena Vista Slough, from the Old Tracy Crossing to the Bonestell House?

A—Well, I cannot keep account of the number of times I have been there. I think I have been down there every year since I have been on the works.

Q—What kind of a slough or channel is that from the Old Tracy Crossing to the Bonestell House?

A—It is a deep channel. It would average, probably, not less than seven feet, or eight; much deeper in places; there are places where it is 20 or 25 feet deep, and 50 to 100 or 150 feet wide. I have been down that channel in a boat a part of the way; not very far below Headquarters, not more than a mile or two.

I know where Norton, who was last on the stand, lives; and I know the channel that runs by his house. At that point the channel is 125 or 150 feet wide.

Q—Do you know the channel where it runs through the northwest corner of the section he is on?

A—Yes, sir; that is Section 10. At that point it is 50 to 60 feet wide. In some places 100, I think. I have often crossed the channel of Buena Vista Slough; crossed it above Headquarters, at Tracy's Crossing; crossed it below Headquarters, right at Headquarters, and on to Weed Island. I crossed there frequently. I have crossed at the Bonestell house, just above his

place, at Section 24, and below there. I crossed at the Bonestell house on the 27th, Saturday last. The channel where I crossed it was 40 or 50 feet wide. The water came right into the buggy. I should judge it was three or three and a half feet deep, probably. From there I went to Headquarters, following the channel right up, driving along the banks in most places. Once in a while I would come into a bend, and strike across. I could see indications of a channel all of the time. The longest distance I was away was, probably, 100 yards. I could not tell exactly; it was probably 100 yards across the bends. There was very little of the channel, but that I could see. In going from the Bonestell house on the channel to Headquarters, there might have been a quarter or half a mile of the channel I did not see. There was one place, and probably two places where the water had run out of the channel a little. The first place it was just running out over the banks, just above Weed Island. There was one place down on Weed Island, where there was a high-water channel, and it was running out a little ways; just barely enough to wet your feet. At the head of Weed Island it was running in it, in the western channel, two or three hundred feet wide. It was just entering that. There was probably a foot of water in there. After crossing that point we found no more water running out of the slough over the banks. I went to Headquarters.

Q—What was the distance that you drove along the banks of the slough, in that swamp, following the meanderings of the slough?

A—Probably twelve or fourteen miles. There was quite a body of water running in it there. When we crossed it full, there was three and a half feet of water anyhow—running water. The slough was deeper as you go up. Started from Bonestell house, and followed the channel right up to Headquarters.

CROSS-EXAMINATION.

The gate that I put into my levee on the Buena Vista Slough at Headquarters was right at the point where the levee crossed the slough, or within 50 feet of it. It was built right in the edge of the slough, the west branch. Last Saturday I first came to Buena Vista Slough at the Bonestell place, in a buggy. I think it ran into the bottom of the buggy there. The water was running pretty fast, probably a mile and a half or two miles an hour; probably three feet of water in the channel. I followed the channel from there right up to Headquarters. I think it is nine miles in a direct line, or ten miles. I think I have followed it up about twelve miles; that is, the course of the channel; I found water all the way.

Q—How much water was running in that channel all that distance?

A—Well, it was three and a half feet where I crossed it, and that was the shallowest place that I know of. That water was coming from the head gate that I speak of. There was a high-water channel, where the water had just run out; it was not overflowing the banks of the channel at any point for that distance. No water was running over the banks from Bonestell's house to Headquarters. The water was entering, and just got a little way into west channel, at the head of Weed Island. The banks of the channel were not full. The channel would hold a good deal more water. There is one continuous channel the whole distance. There are high-water channels, where the water will run out before it will overflow the banks. There was, during this distance of twelve miles, a continuous, connected channel, and the water running into it was not as much as it would hold without overflowing its banks. The twelve miles that I went was down to Section 24, Township 29, Range 23.

Q—Now, in the course of that twelve miles from Bonestell's house up, the water was running down in this channel, and at no place was it getting out of the banks or overflowing the banks ?

A—No, sir. I drove right along the edge of that bank, right at the edge of the slough. There was a place, probably on Section 25, where the ground was lower to the west, and the water was standing in that depression. It only got out a little way; it was just a shallow; it was 6 or 8 feet wide, and might be 100 or 200 yards long; not more than that. In order to go into that depression, it did not run over the bank of the channel there. It raised up into that little depression there. On Section 4 it was running into the west channel; that is three miles below Headquarters; to go direct, a mile and a half. This west channel, where it runs through Sections 4 and 9, is probably two feet deep. It is a well-defined channel, as a general thing, all of the way from Section 4 down to Tulare Lake; I call it a well-defined channel. There are portions of it that I have not followed, but I have crossed it. I know it generally. To confine the water to that channel, it would probably carry two feet of water from Section 4 down to Tulare Lake as far as I know. I don't know any place between Section 4 and Tulare Lake where two feet of water would get out of the channel.

Q—What is the greatest width of the water from Headquarters down to Bonestell's in that channel you speak of, the other channel ?

A—The middle channel. It is a channel; there is no "middle" about it. Well, there are probably places in that that are 150 feet wide. Such places must be on Section 5, I should think.

Q—How are the banks of that channel on Section 4 ?

A—There are high banks. The lowest or most sloping banks of that channel are on Section 5 or Section 4.

At that point the channel is 100 feet wide and the banks raised up.

Q—Is it a well defined channel there?

A—Yes sir.

Q—When it is dry, how can you tell.

A—You can always tell it when you come to it. You would recognize it by the depression, outside, bounded by tules. Tules right on the bank. There are no tules growing in there at the present, unless it should be a flag or something of that kind. There are a few tules in the channel. When you come to compare the two, there are no tules in the channel, and there are out of it.

The difference in elevation between my headquarters and Tulare Lake is about 72½ feet.

F. M. Epperly.

I reside down on Buena Vista Slough; I came to the slough in 1871, in May, to a point about 15 miles below Wible's Headquarters known as the Dover Camp; I think it is on Section 1. I remained there until May, 1876; I was living there all of that time, raising hogs. I was running them on Buena Vista Slough between the lower end of Weed Island for about nine miles front there, commencing about two miles south of the Bonestell House. I left there in 1876; I returned in 1877, the first days of August, and went to work for Mr. Crocker, tending stock pumps. Camped on the slough about three miles above the Dover place. I remained there about four months. Miller, Lux and Crocker had twelve pumps running, if I remember right. At that time the slough was dry and remained dry as long as I stayed there.

I was traveling through the swamp there all the time while there, from Weed Island to six miles below, about nine miles. I came back there again in the fall of 1878, October or November. There was no running

water there then. I located then on the swamp six miles below the Tule House, on the west channel; on the west side of it. I was working from the adobe holes down to the Tule House. I then moved back to Dover's Camp in 1880; still raising hogs there; and have remained there all of that time up to the present time.

Q—Have you ever been on Buena Vista Slough south of the north end of Weed Island, that is, between the north end of Weed Island and Buena Vista Lake?

A—Yes, sir. I have been there a number of times; I could not tell how many, and lately a few times backwards and forwards. It is hard to remember the number of times, traveling around there the way I was. I suppose I have been there fifty times, may be over. I was along the slough there in 1872, hunting elk. I was on the slough at different points, traveling up and down the slough on the west side of it, nearly the whole length of it between those points. There was a great deal of water in there at that time. It was confined to the channel in most places. In a few it was running out. That must have been in June or July, 1872.

Q—What was the condition of the slough at that time between Tracy's Crossing and the Bonestell House?

A—Well, there was a channel, a perfect channel, from the Bonestell House, below the Bonestell House, up to where you come to what is known as the drift, and there the water spread out some from the formation of this drift, made two or three different channels, and they all came back into the same one, with the exception of one that made out on the west side, that followed down on the west side of the swamp.

Q—What was the condition of that channel above the drift?

A - There was a well-defined channel from there on out, of different widths, some places 60 to 125 feet, and may be 150 feet. I don't know how deep the water was in it. The water was running in it—running north. I have seen the channel when there was no water running in it. I think that channel would average seven feet deep. The most of the way down to the Bonestell House it has got banks. There are a few places that I could not cross on account of the banks being straight up and down. I crossed the channel at the Bonestell House, first, in 1873, and I rode across on horseback. It did not quite run over my horse's back. I crossed that at that point last, about a week or so ago. There was water running there then. It came up to my horse's side. I think the water must have been three feet and a half deep. The water was running north then. I have also crossed that channel about a mile above the Bonestell House, south. I first crossed there in 1873, and it swam my horse ; and have crossed there a number of times since. I have not crossed the channel at any other point above the Bonestel House, except that, until you get above the head of Weed Island; I have crossed it there. You cannot cross it in high stage of water, but in low stage you can cross it there. I have crossed it at Norton's Ranch. When the water is low there is a pretty good crossing, but when the slough is anything like full, a man cannot cross it without swimming. I have crossed above there at the Old Tracy crossing.

Q—Has there been any change in that channel since you first knew it in 1873 to the present time?

A—Not that I can see, any more than the drift pile. The wood that has drifted in there has been burned out and hauled out, and left the channel more bare than when I first went there. It has a better channel to pass through than it did when I first went there. The main channel, after it leaves the drift pile, runs through

the island, going north. The west channel runs down on the west side of the swamp. The bed of that channel where it leaves the main channel is a great deal higher; the bottom of it is a great deal higher than the bottom of the main channel. It is just a flat trough where it leaves the main channel. I should think the water would have to be about three feet deep in the main channel before it would escape into the western channel. It is a kind of flat basin of a channel. I guess it must be one hundred feet wide. That channel runs off west near where the drift pile was. That was about a mile and a half north of the Norton House. After leaving the drift pile that channel remains a kind of a wide basin in places; other places a well defined channel with banks to it. It continues on, and goes clear down into the main channel that goes into Tulare Lake. It joins the main channel, if I recollect right, not far from the Fish Pond.

It is a hard question to answer as to how wide it will average. In some places it is a well defined channel, and in other places the water spreads out, it may be fifty or one hundred feet wide. I think the channel would carry two and a half feet of water without overflowing its banks. There would then be places where it would be one hundred yards wide; other places where it came down to a narrow channel not over thirty or may be forty feet wide. I have seen water running in that channel from the point where it leaves the main slough, to where it connects with the main slough at the Fish Hole. I saw it first in 1872, and then in 1873 and 1874. I saw water running all the time. I was working at that time along the channel. When the water recedes and is confined to the channel, after the spring freshets, right there, four-fifths of the land along the slough can be traveled over. At such times, when the water recedes it stops flowing into the side channel, runs back into the main channel and flows

down the main channel. There has been no particular change in the western channel of Buena Vista Slough since 1871, any more than where the drift was in the main channel, just below the Norton Camp. That has been removed by fire, and by people carrying the wood away. The water is running the same now as when I first knew it, only in one place, at Dover's Camp, where a break in the canal has filled up the main channel in a measure. That drift consisted of a mass of timbers and different kinds of brush. There were logs there from one and a half to three feet through, some willow, pine and mountain cedar. There must have been logs there thirty or forty feet long, may be fifty.

CROSS-EXAMINATION.

I was there last on the channel that runs from Headquarters, or Epperly's Camp, down to Bonestell's last Saturday. I followed it down from Bonestell's house up to Norton's Camp. I didn't see but two places where the water was flowing over the banks any; there were some low places making out, that the water was breaking out into; one place very close to the drift, where the water was running out into that flat channel on the west side; the western channel I don't suppose there was over ten inches in depth of water running out there. There must have been four feet of water in the main channel, or nearly that. I crossed the channel at Bonestell's house. There must have been four feet of water in the channel. A little over a week ago I was on the channel below the Bonestell House. The water was running below the Bonestell House. I think about one mile. I was there at a point where I could see the end of the running water. It was passing along down the channel.

At that time I followed the channel from the Bonestell House up to Headquarters. The water at that

time was all confined to the channel. It was not overflowing the banks nowhere.

Q—Did you ever follow the channel from Weed Island all of the way, every bit of it, to Wible's Camp?

A—Yes, sir; I have been around the bank of the slough all of the way through, all along there.

Q—Was it the same channel all of the way?

A—With the exception of that drift pile, as far as I can remember. I don't see any change from the time I first saw it to the present.

Q—Norton's is on the south line of Section 10. How far is it from that to Weed Island?

A—I don't think it is over two and a half miles. I think the drift pile is about a mile and a half below Norton's Camp. It may not be over a mile. I don't know but one place where there is a drift pile on the channel between Norton's Camp and Weed Island. I have traveled all up and down that channel in different directions. I don't know but one place. I could not say that I have traveled over every foot of it. A man is not liable to step over every foot of it. I have been on the margin of it and all along from the Bonestell House to Norton's Camp, and have been on it as far up as Wible's Camp, and have seen it in holes. I know of no place between Wible's Camp and the Tule House, where I can cross the swamp land without striking the channel. I know places where I can cross where the channel is small. I know of no places where I could cross by riding around the holes or depressions without striking any channel at all. I would always find the body of water running down through the swamp, if water was running, and if not, I would find a depression in the land. That would possibly take two and a half feet of water to throw it out again, and spread it out over the land. I think it would carry at least two and a half feet of water. Last

Saturday I saw the water running out of Buena Vista Slough into the western channel. There must have been some rise in the water from the time I was there before, because at that time there was no water running out. There must have been some rise in the slough. I on that day was only on the channel at the Bonestell House, from there started up to Norton's house, followed up along through Weed Island to Norton's house.

This was all the testimony given in relation to the existence or non-existence of a continuous slough or channel from Buena Vista Lake to Section 24, Township 29 south, range 23 east.

We shall pass the other findings in relation to the channel from Buena Vista Lake to Tulare Lake, which we claim are contrary to and not justified by the ~~findings~~ evidence, and giving the evidence as to the existence of such channel, and then call the attention of the Court to the particulars in which we claim the findings are contrary to all such findings. We adopt this method to shorten this brief, which the nature of the attack made by us upon these findings makes a full and voluminous brief necessary.

III.

THE FOLLOWING FINDINGS ARE ALL CONTRARY TO THE EVIDENCE: 4TH, 5TH, 12TH, 13TH, 14TH, 16TH AND 17TH.

The plaintiffs in this case alleged in their complaint that Buena Vista Slough was a continuation of Kern River. They set out that, prior to a flood which occurred in 1862, Kern River ran down what is known as South Fork and into the east end of Kern Lake; then north through Kern Lake, Buena Vista Lake (and a channel connecting them), and then down through Buena Vista Slough to Tulare Lake. That after such

flood and until another flood, which occurred in 1867–8, the water of Kern River flowed through Old River and on towards Tulare Lake. That the flood of 1867–8 opened the present channel of Kern River, which empties into Buena Vista Slough direct without passing through Kern and Buena Vista Lakes; and then alleges that such waters have, from time immemorial, flowed to and through Buena Vista Slough, and along by and through plaintiffs' lands, and that none of the changes of the course of the river have affected the supply of water to Buena Vista Slough.

The 6th finding is that Kern River is a natural watercourse. That until 1861–2 the main channel of the river was the South Fork, which emptied into Kern Lake at its easterly end, but that some water ran down the channel known as Old River and emptied into Kern and Buena Vista lakes.

By the 8th finding it is found that from 1861–2 until the flood of 1867–8 Old River was the main channel of Kern River, and that it emptied into Kern and Buena Vista lakes. That some little water in times of freshets would run down a channel known as Goose Lake Slough.

By the 9th finding it is found that the flood of 1867–8 opened the present channel of Kern River. That after such channel was opened "the waters of Kern River, "in their natural flow and at ordinary stages, divided "at the head of Old River, and one-half thereof con- "tinued down Old River, and the other half followed "the present channel of Kern River, known as 'New "'River.' That such continued to be the flow of the "waters of Kern River until the fall of 1877," when the Stine Canal Company constructed a head-gate across the head of Old River; and that, since that date, New River has been the main channel of Kern River; and that, since 1867–8, the water flowing down New River continued on in their natural flow to and into

Buena Vista Slough, and thence to and into Kern and Buena Vista lakes. That in time of unusual freshets and extraordinary high water some water would overflow the bank of Buena Vista Slough and flow northward, and flow the swamp and overflowed land "designated as Buena Vista Swamp."

And by the 12th finding it is found that until the construction of the works of the Kern Valley Water Company occasionally in the winter and spring of the year, unusual freshets would cause Kern and Buena Vista lakes to overflow, and that a portion of the overflow would find its way along Buena Vista Slough to and into the body of swamp and overflowed land of which plaintiffs' land forms a part, but following no defined course or channel.

And (13th finding) excepting from seepage and percolation and such overflow and from the effect of the artificial obstruction at Cole's Crossing, none of the waters of Kern River flow or ever have flowed, to, along, by, through, over or upon the lands of plaintiffs, or any part thereof.

And (14th finding) except by reason of such artificial obstruction, overflow, seepage and percolation, none of the waters of Kern River irrigate, or ever have irrigated any of plaintiffs' lands, or made them fit for cultivation or pasturage, or have supplied water for stock or for agricultural or domestic purposes, or for any purposes which an owner of land on a running stream has a right to use the water thereof, or for any purposes.

By the 16th finding it is found that by reason of the flood of 1867-8 filling up Buena Vista Slough at the point where Kern River enters it, with sand and sediment, the capacity of Kern and Buena Vista lakes has been increased, thus increasing the capacity for holding water, and also increasing the evaporation there-

from, and rendered the overflow from said lakes down Buena Vista Slough less frequent.

And (17th finding) that whatever waters of said Kern River and lake find or ever found their way northward, never did so flow as to constitute a water course, but have always squandered themselves over the swamp land, spreading from high land to high land.

It appears from the findings that prior to the flood of 1867-8, that all of the water of Kern River naturally ran into Kern and Buena Vista lakes. That from 1867-8 to 1877 all of such water (except a little that ran down Goose Lake Slough during the flood of 1867-8) ran into Kern and Buena Vista lakes, one-half by the channel known as Old River and one-half by the channel known as New River. That after the fall of 1877 New River became the main channel and the water ran into Buena Vista Slough, and thence into Buena Vista and Kern lakes.

So far the findings do not materially differ from the allegations contained in our amended complaint, nor from the proof offered in the case, except in one particular. By the evidence it appeared that only a portion of the water that ran down New River and emptied into Buena Vista Slough, ever went into Buena Vista and Kern lakes; that the greater portion of it ran direct down Buena Vista Slough, northerly and through plaintiffs' lands.

But we contend that the 4th, 5th, 12th, 13th, 14th, 16th and 17th findings are all contrary to the evidence in this:

First—It clearly appears by the evidence, that all of the water that ran down Kern River and into Kern and Buena Vista lakes, whether it entered by the channel known as the South Fork, or Old River, or Buena Vista Slough, had for its outlet Buena Vista Slough, which ran through plaintiffs' lands towards Tulare Lake.

That Buena Vista Slough from Buena Vista Lake, to Tulare Lake, has been from time immemorial and now is a water course and a continuation of Kern River.

We shall address ourselves to the question of Buena Vista Slough being a continuation of Kern River, and a natural water course from Buena Vista Lake to Tulare Lake.

The fact that the immense quantity of water that comes annually down Kern River, if left in its natural channel, would find, and has always found its way to Tulare Lake; or in other words, that Kern River, empties into Tulare Lake, is a fact that the Courts take judicial notice of, as one of the prominent geographical features of the country, such as lakes, rivers and mountains, and as a part of the common public history of this State. This Court will take notice that Kern River is one of the largest rivers in California.

Winnipeseogee Lake Co., v. *Young*, 40. N. H. 430;
Neaderhauser v. *The State* 28 Ind., 267;
Cash v. *Auditor of Clark Co.*, 7 Ind., 229.

Courts take judicial notice of the geographical position of rivers.

City Council of Montgomery Co., v. *M. & W. Plank Road Co.*, 31 Ala. 87;
Whitney v. *Gamb*, 11 La. Ann., 433.

If there was not sufficient proof as to the course of Kern River, and where it emptied, the Court should have taken judicial notice of such fact.

Brumagin v. *Bradshaw*, 39 Cal., 40;
People v. *Smith*, 1 Cal., 13.

Courts take judicial notice of whatever ought to be generally known within the limits of its jurisdiction.

1 Greenl. Ev., § 6.

What school boy in this State, if asked where Kern River rises and into what it empties, would not answer: It rises in the upper Sierras and empties into Tulare Lake. Or, if asked what rivers empty into and form Tulare Lake, would not included Kern River as one contributing to the formation of that body of water. Should the Court be not so well informed, all it need do is to resort to any map of the State of California for the information. Not a single map of this State that we have ever seen but has this water course delineated on it. We specially refer to the very elaborate map of the Southern and Pacific Coast States, compiled from explorations and surveys made by Lieut. G. K. Warren, Topographical Engineer; Brev. Maj. W. H. Emory, Topographical Engineer in 1854; Capt. A. A. Humphreys, Topographical Engineer in 1854–'58, and issued by the War Department in 1868. Should it find that Kern River or Buena Vista Slough ran through and formed a body of swamp land, and was therefore not a water course, or did not empty into Tulare Lake, it would also have to decide that the Sacramento River, San Joaquin River, Napa River, King's River, and all other rivers emptying into Tulare Lake or the Bay of San Francisco, were not water courses, and did not empty into the Bay of San Francisco or Tulare Lake, as the case might be.

We have, if the findings in this case be true, a river running at least 2500 cubic feet of water per second, with no outlet for its waters, except two little lakes of such size that they would be filled by a month's flow of the river.

But outside all this, the evidence is clear, positive and conclusive that all of the water of Kern River, if left to run in its natural channels, would run down the channel known from time immemorial as Buena Vista Slough, and running from Buena Vista Lake to Tulare Lake, and as testified by several witnesses, it could not

run anywhere else. And this channel runs for miles through the lands of plaintiffs, and the Court finds (79th finding) that this 200,000 acres of swamp land along Buena Vista Slough, by reason of overflows from Kern River, prior to September 28, 1850, became swamp and overflowed land.

The witnesses who testified to Buena Vista Slough being a continuation of Kern River, were numerous, and the period of time covered by their testimony took them back to 1843–4, and came down to date.

The condition of the Buena Vista Slough Channel and the flow of water along it was testified to by parties who had spent the best years of their lives on that body of swamp land. Also by parties who had explored and examined this very channel with a view of locating this land if such a channel could be found. Also by the United States Deputy Surveyor who surveyed the land in 1853–4, and by persons whose business had taken them, year after year, the whole length of Buena Vista Slough, from Buena Vista Lake to Tulare Lake, with stock, and who depended upon the flow of water in this very channel to supply their cattle.

R. B. Still

Testified that he was on Buena Vista Slough first in 1874, and was there every year after that (except 1876). He was working with cattle for Cox & Clarke. Found a good channel from Buena Vista Lake to Tulare Lake, and in 1874 and '5 it was running full of water and swimming wherever he crossed it (6 feet, vol. 2, fol. 794); crossed the slough at one thousand different places, and on each quarter section of land. Always found water running along the slough northward. That in 1874–5 it always had running water in it, but after that it was dry most of the time.

F. A. TRACY,

A stock-raiser on Buena Vista Slough, testified: First saw Buena Vista Slough where it leaves Buena Vista Lake in 1860, August. It was an average stream of running water then—running northwest.

Next went there in the fall of 1863; moved there with stock. Stopped on Buena Vista Slough about 30 or 35 miles from Buena Vista Lake and 6 miles from Tulare Lake; remained there one month, and then moved up 7 or 8 miles, and remained at that point during the winter of 1863–4; then moved further up Buena Vista Slough to my camp, 3 or 4 miles northwest of Buena Vista Lake; must have reached my camp about the middle of summer of 1864. I remained there until 1867, 3 years, taking care of stock. I was there ten months of each year at least during 1864–5 and 6. My cattle ranged on Buena Vista Slough down to Tulare Lake, and I went that far in connection with my stock. I was crossing the slough in 1864 and '65 several times a day for three or four months. In 1866 I was still running my stock between the two lakes. In the fall of 1867 I moved about 3 miles north on to Goose Lake Slough. My camp on Buena Vista Slough was on Section 19, T. 30 S., R. 24 E. It might have been Section 24; one mile south of Wible's Camp.

Tracy's Crossing on Buena Vista Slough was close to my camp. I then moved to Section 4, T. 30 S., R. 25 E., and remained there three or four years, taking care of the same stock. I think I moved from there in 1874.

In 1867–8 I was ranging my stock on Buena Vista Slough, on both sides, all the distance along Buena Vista Slough from Buena Vista Lake to Tulare Lake; was crossing it to and fro in 1867–8. During 1869 I was also on Buena Vista Slough with my stock.

We used to cross at my crossing, below Weed

Island, across Weed Island. Had boats when the water was high. When not high we would go in to the bank and swim the horses through. Below Weed Island we could cross without swimming by hunting shallow places. We found two branches where we crossed Weed Island. The east branch we would have to swim a little ways; the west branch we could get through without swimming. Below we used to cross and swim in one or two places where the water was high in 1866–7–8. There were two or three sloughs down there that were deep. I was crossing the slough at the same points in 1870. I do not think there was so much water that year, but the sloughs were the same. In 1871 the water got quite low. I was surveying the whole length of the slough from Tulare Lake, and working the whole length of the swamp. It ran that year, to my knowledge, within six or eight miles of Tulare Lake. There was a short supply of water that year. We could get in on both sides of Weed Island without swimming, but still found a slough on both sides. From 1863 to 1871 the current was always setting towards Tulare Lake. I still had my cattle there in 1872. There was considerable water there that year, I think. In 1873 there was a good deal of water, and in 1874 there was a great deal of water. There was considerable water in 1875. I was running my stock along the slough during 1872–3–4 and '5, and between the two lakes, the same as previous years, and crossing from side to side. The water in the slough was quite low in 1876, but no cattle died that year for want of feed. I lived on Goose Lake Slough from 1874 to 1877 or 1878. I had stock on the slough until two years ago. In 1877 the water was very low. It stopped the growth of vegetation. There was a heavy loss of cattle that year, they had not water to drink. The supply of water in 1878 was pretty good. I have been crossing Buena Vista

Slough from 1863 to 1878. I have crossed it, I should think, two hundred times; we had crossings at the upper part, but further down we crossed it whenever we came to it. Turned up and down it, crossing and re-crossing in many places. Think I have crossed it on every section between Townships 27 and 28 and Tulare Lake. It was natural for me to follow up and down the slough, and I think, in doing so, struck every section. We had no crossing prior to 1877 below my crossing, until we reached the middle of Weed Island, seven or eight miles down. There was another crossing, twelve or fifteen miles down, and a third eight miles lower down.

From 1863 to 1877–8 Buena Vista Slough was an open channel of water, running down from the point it left the lake for twenty miles to the center of and through Weed Island; it was an open channel. There were some obstructions where flags had grown up at the head of Weed Island; that would be about 8 miles from my crossing, and 13 or 14 miles from Buena Vista Lake. Prior to 1868 the channel ran through Weed Island. After 1868, it divided almost entirely at the head of the island, and washed out a channel to the right and left. Between 1863 and 1868 the channel between the south end of Weed Island and the line dividing Townships 28 and 29 was wide. In low water it might be more than 100 feet wide on an average. From the lake to my crossing Buena Vista Slough was from 50 to 100 feet wide between 1863 and 1868, and down to Weed Island it was very much the same. For 2 or 3 miles it would average 50 to 100 feet, then for 2 or 3 miles it was not quite so wide. Then it would divide and go around Weed Island, and come together again below. The channel between the lines dividing Townships 28 and 29 and Townships 27 and 28 was a wide channel, from 100 to 150 feet wide; some places more. Through the next township it was

better defined. There used to be more than one channel. The main channel would average 80 feet. The channel is all the way between Townships 26 and 27 south and 25 and 26 south. I have seen water running the whole way through the channel, from one end to the other. Below that the channel is very much as represented on this map. Through Township 26 S., R. 22 E., the channel is, I should think, 100 feet wide. The west channel was a good wide channel, and seemed to be continuous. I have been there when water was running in it. The Tule House is right on the bank of the east channel, on the east bank. The east channel, which runs through Township 25 S., R. 22 E., is a perpendicular channel, and I think that open channel continues on to the lake. I have seen it to the lake when the water was high.

Prior to 1868, and after 1863, the water of Kern River ran into the slough between the lakes. The outlet was Buena Vista Slough. In 1868 New River was *opened to* Buena Vista Slough, and ran into the slough in two branches. The north branch entered the slough on about Section 32, T. 30 S., R. 25 E., and the water that ran down that branch would run northwest down Buena Vista Slough. The water that ran in the south branch would go into the lake, and after the lake was filled run northwest down Buena Vista Slough, and all would run to Tulare Lake. There has been no material change in Buena Vista Slough from where it leaves Buena Vista Lake to Tulare Lake, from what it was between 1863 to 1868. In 1868 the water washed out the channel that ran around Weed Island. That was caused by driftwood coming down in the channel. Prior to 1868 the water of Kern River ran into Buena Vista Lake, and then down Buena Vista Slough to Tulare Lake. The flood of 1868 made no change as to where the waters of Kern River were ultimately dis-

charged. I have been on Buena Vista Slough in a boat from the lake down nearly to Weed Island, and crossed it in boats below Weed Island. I own land along Buena Vista Slough. Cattle did not do so well on Buena Vista Slough during the years 1866–7, which was a dry year. The land along Buena Vista Slough would be entirely valueless to raise cattle on if the water should be turned out of Buena Vista Slough, and no water run down through it, nor would it be worth anything for agricultural purposes.

CROSS-EXAMINATION OF F. A. TRACY.

I have been familiar with Buena Vista Slough from Tracy's Crossing to Tulare Lake, ever since 1863. There has not been a continuous current of water during all that time through said slough from Tracy's Crossing to Tulare Lake. In 1863 and '64 and 1871 and 1877, I think these are the years it has been comparatively dry. It was quite late in the fall of 1863 that I was there and then I found water standing in holes. The one I stopped on was about one and a half miles long. It remained in that condition until towards the spring of 1864. In April, I think, it filled up and passed my camp and left me on an island. By the last of July it was in holes again and remained in that condition until late in 1865, March, I should think. Col. Baker put a dam in the slough. 1871 was the next dry season we had. I think there was plenty of water in 1865 for stock purposes all through the swamp. There was water a great while in 1865. The slough being dammed off that year I think it made a little difference. It was not out of holes a great while in 1865.

In 1866 a good deal of water went clear through and filled the entire slough. I don't think it fell into holes that year. It was outside of the slough some. 1867

was high water all the year through. The flood was the last of 1867. It did not fall into holes in 1868. I don't think it did in 1869. In 1870 it might have stopped running; but I don't remember exactly about that. In 1871, it dried up and was in holes along towards the latter part of the summer, and remained in holes until after Christmas. About the last of December we had a heavy rain. I think Mr. Crocker had to pump that year. In 1872 there was a good deal of water—considerable I think the water ran through. I don't think it fell into holes at any period during that year. In 1873 there was plenty of water, and in 1874 there was plenty of water. During those years the water was outside of the slough. In 1875, I think we had plenty of water. I don't know but it receded considerably in 1875. It was more confined to the channels. It was drier in 1876. It went into holes, I think pretty early in the season, perhaps in July or June, and continued that way until in the fall some time. 1877 was a very dry season. It went into holes pretty early in the season; it must have been June or July. That year I pumped until about November. I think there was a rise about that time. I moved 1200 head of cattle off in 1877 as the feed was getting very short. In 1878 it was better. There was plenty of water in the slough. I was not there much in 1878. I was there but once in 1879. I think there was a fair head of water in the river in 1879. I was not on the slough in 1880. I just crossed Nat Cole's bridge in 1879. There seemed to be considerable of water there then, running northerly towards Tulare Lake. It was in the spring, February I think. I have crossed the river since the 15th; last Saturday, I think. The water was quite well up, quite high; quite a good head of water in Kern River. I have seen it a number of years not so high as it is now. I think it is higher now than the average of seasons since I have been here, since 1864.

It does not require much of a rise in the hills to float water over this swamp. There are a great many channels through this swamp. The east channel is quite an open channel into Tulare Lake; has no tules growing in it. There are some tules and flags in what we considered the main channel from Wible's to Tulare Lake. Other channels leave the main channel and come back to it again.

From 1871 to 1876 there was no loss of cattle on Buena Vista Slough from starvation or want of water. In 1877 thirty per cent. of the cattle died for want of water and feed.

During 1872–3–4–5 the water ran through Buena Vista Slough to Tulare Lake all the year. The flow of water now in Kern River is greater than it was during 1872–3–4–5, I think. In 1876 the water commenced to dry up down there. A great deal of water was being used for irrigation above the slough which was, I presume, the cause of it, and I presume the same was the cause of water ceasing to run down in 1877, but there was not much water from the mountains that year.

J. M. Lewis

Testified: I first crossed Buena Vista Slough in 1862, driving stock and horses; crossed the slough at the Tule House. It was in April or May; found swimming water there. Recrossed the same year about two miles from Tulare Lake. Found water on the west side swimming; on the east side we forded water coming up mid-side to our horses. I think that was in June. Was again on Buena Vista Slough in 1863, gathering cattle; there was plenty of water in the slough. Was on the slough again in 1866, gathering cattle and branding calves. We struck the slough at Tulare Lake, and worked up it to Tracy's Crossing on Buena Vista Slough; it took 10 or 12 days. We camped along the slough. I think it was in June. There was consider-

ble water at that time running north to Tulare Lake. We worked up on the west side, crossed and worked down on the east side of the slough to Tulare Lake. Was about the same time going down as coming up, and camping along the slough there was considerable water in the sloughs; they were full and running all the distance to Tulare Lake. Was on the slough again in 1871, April. I Struck it at a point 12 or 15 miles from Tulare Lake, and went up the slough some 10 or 12 miles. Was gathering cattle; was there a week or ten days. We crossed the slough once in going up. It was dry where we crossed. Some water in ponds along the slough; but very few of them. Was on the slough again in 1876. Struck it at Tulare Lake, and went up some 15 or 20 miles; was there something like a week gathering cattle. Crossed the slough at one place and found swimming water. It was in April, I think. Went back again in September, 1876. Struck the slough at the Tule House. It is on the east side of the eastern channel of the slough. I was taking cattle down there. There was water enough to swim some of the cattle. I was there off and on all the fall and winter of 1876, attending cattle. I was there most of the year 1877 pumping water. Commenced pumping in July, and pumped until January 15, 1878. The sloughs were dry during 1877. The first part of 1878 was dry. I was along Buena Vista Slough during 1878, looking after stock. I was on the slough in 1879 at a number of places; was pumping; had a pump at the Tule House; commenced pumping the first part of May, 10th or 12th, and continued to February 27, 1880. There was no water running down the slough between the time I commenced pumping in 1877, and that I ceased in 1878, and none running down the slough as far as I was between the time I commenced pumping in 1879 and ceased in 1880. I was on the slough all of the year 1880, off and on,

working there with stock between Tulare Lake and the lower end of Weed Island. The channel of the slough from Goose Lake to Tulare Lake, since I have known it, averaged from 80 to 150 or 200 feet wide, and perhaps an average depth of 6 or 7 feet deep. The current of water in that channel is towards Tulare Lake.

I have been on that channel as high up as Tracy's Crossing and crossed it back and forth. Could not tell the number of times I have crossed it. Several thousand times I presume. I presume at every section of land there is between Goose Lake and Tulare Lake, on every half section and quarter section. Between Goose Lake and Tracy's Crossing, there is a deep channel, confined channel; a well confined channel where I crossed it. From Goose Lake to Tulare Lake there are two channels. I don't think there is much difference in the size of the channels. The west one is a little larger perhaps. Fifty per cent. of the cattle on Buena Vista Slough died during 1877, for want of feed and water.

CROSS-EXAMINATION OF J. M. LEWIS.

Was on Buena Vista Slough in 1862, 1863, 1866, 1876 and 1877, and from that on, more or less all the time. All my work has been there since 1877. I have been working for Cox & Clarke. In the latter part of 1876, the water commenced to go down. In January 1877, it was in holes, dried up completely in July, and continued so until January, 1878. I think it was dry from Februray, 1879, to February, 1880. Plenty of water in February, 1880, and lasted the most of the season; commenced to decrease in July or August. I have been at the Tule House twice this year (1881), and in Salt Slough, five or six miles above the Tule House. The last of February, the banks of the slough were pretty full; a swift running stream at the points I have

mentioned, I saw the banks full this year at the Tule House, not all it could carry, not running over.

THOMAS L. BRIGGS

Testified: I know the stream of water known as Buena Vista Slough running between Buena Vista Lake and Tulare Lake. I first visited that slough in 1864, in the spring, and struck it about 25 miles from Tulare Lake, about 8 miles north of Goose Lake. I drove over a lot of cattle that year. I crossed the slough and came up to Kern Lake. The water was very low in Buena Vista Slough. That was a dry year. It was probably in March or April; I cannot tell which. Next visited the slough the next year, and struck it at Tracy's Crossing. Visited it next in 1866. I was then getting up cattle. Struck the slough then at the adobe holes, and crossed the slough, and from there worked up the slough. I next visited the slough in 1874. I was then getting up cattle. I don't remember where I did first strike it. I was on both sides of it. I was there about a month. It was in the spring of the year. During that time I was on the whole length of the slough from Buena Vista Lake to Tulare Lake. The water was high in the slough at that time. We crossed the slough at Tracy's Crossing and at various places. We had to cross the slough to the islands to do our work. Various places we had to swim. We crossed to the islands from the east side. Crossed to Weed Island, Broder Island, Salt Slough Island and Bull Island, and in crossing we found the water very deep. In places we would have to swim 30 or 40 feet; in most places more than 30 feet. Outside of the main channel in the tules the water was 2 or 3 feet deep. I think I was there a month, and crossed three or four times a day at various points. This was in 1874, after the spring flood. Next went to the slough in 1875, getting up scattering cattle. Was there two or three weeks. Went over the

same ground I had gone over before, and I was on both sides. I found the water very high in crossing. I had to swim in making the crossing. I think the water was a little higher in 1875 than in 1874. During that season I crossed the slough three or four times a day. We were working in the swamp at the time. In 1875 we camped on both sides of the slough, gathering cattle on both sides. We crossed to the same islands we did the year before. The water was very high, and we had to swim in making these crossings 30 or 40 yards, probably; in other places not so far. In crossing over the west side we always found a channel of water—a deep channel. I went back again in 1876, gathering and branding cattle. Struck the slough at the Tule House. Was on the slough pretty nearly all that year. Reached there in June, I think. I was there at some time every month from June to December, except for a month or two in the winter. I went to all points on the slough, and was crossing the slough from time to time. I don't remember what the condition of the water was. I don't think there was so much water. I think there was lots of water when I left in 1876. I went there again in 1877. The water was low. I don't think there was any water running in 1877. There was pumping going on along the slough in 1877. Cox & Clarke and Miller, Lux and Crocker had their pumps there. One-half of the cattle died that year from scarcity of water and feed. I was there pretty nearly all that year. I was there in 1878, but not long. I was there during the last of 1880, in the spring, and remained three weeks, more or less, and was there again in the fall. I was getting up cattle. I was on the slough from one end to the other, crossing to and fro. I have been there this year, and crossed it, but was not there very long. When I was there in 1877 the slough was dry. I was working up and down the slough the whole length of it. I found a well defined

channel between Buena Vista Lake and Tulare Lake—that distance between the two lakes. It would carry water. It was from 4 to 24 feet deep—various depths—and from 20 to 100 yards wide. The water which ran in that slough had a current, always running north.

CROSS-EXAMINATION OF THOMAS L. BRIGGS.

1864 was a very dry year. 1877 was dryer than 1864. Water did not run at all in 1877. I was there pretty nearly all the time that year. I was not there from 1866 to 1874. That year the water was plenty, and we worked up and down the slough from Buena Vista Lake to Tulare Lake. Where I crossed I must have struck more than one channel. In 1875 I crossed frequently from both sides to the islands. In 1874 and 1875 there was water in the channel, not on the islands. There is more than one channel, but not a large number. At Goose Lake there is one pretty well-defined channel, and I think two. In crossing at the south end of Goose Lake there are two deep places, and probably another smaller one. What I call the main channel is the one on the east side. It is a well-defined channel. In 1880 the channel was there, and the same as it was before. I have noticed no change in the channel. It was the same in 1880 as when I first became acquainted with it. In crossing Weed Island you would find two channels. The channels around Weed Island have not well-defined banks all the way; they are sloping. You can always find the banks and know exactly where they are. In high water the water is all over the swamp, and there is a current clear across. Tules begin to grow in the spring, but not till after the freshets. If there is no rise from the river the tules do not grow well in the spring. Outside of the tules the growth is mire grass and salt grass. The growth of that grass begins after the rise mostly. I don't think there would be many tules without an over-

flow. To have a good year down there it requires that the country be flooded. In order to make it successful in the way of tules and grasses, my opinion is that it should be flooded every year. It is worthless for stock in dry years. There was no feed at all in 1877. There was no disease among the cattle that year. Three or four days ago I was at the Tule House. The Tule House is on the slough—East Slough—on the west side of it. I can follow the bed of the slough from the Tule House to Tulare Lake, and can follow it from the Tule House to Goose Lake, and from Goose Lake to Buena Vista Lake. I have never followed the slough up all the way, but I think I can do it. I have been on all parts of it, and think I can do it.

C. W. CLARKE,

Of Cox & Clarke, of Sacramento, testified:

I have been engaged in the cattle business since 1851. I was first on what is known as Buena Vista Slough, in May or June, 1865. I had cattle on Buena Vista Slough prior to that time. At the time I remained on Buena Vista Slough nearly a month. I first came on the slough near Tulare Lake, and worked clear up to Tracy's Crossing. Buena Vista Slough was perfectly dry. I crossed it, and followed right up the swag, where the channel comes down a water course. It was better traveling there than outside. Went there again in the fall of 1865. It was then dry. I suppose I was there thirty days rodeoing. We went up as far as Goose Lake. Was next there in 1866, in the spring, in all about thirty days, from below Goose Lake to the Tule House, and to the head of the lake. We had our corrals down there on the west side of the lake. The Tule House is on the east side of the slough. It was put up in 1875. In 1866, there was not much water there. The water ran again in 1867. In 1867, I worked up and down the slough up

to Staten Corral, which is in Township 26 S., R. 21 E., and on or about Sec. 12 or 1. Our camp was there. That was in the spring of 1867. Plenty of water there then. I was there twenty-five or thirty days, just time enough to gather up the cattle. Was during that time crossing the slough from time to time, could not tell how many times, perhaps a dozen a day. In making these crossings, the horses would swim a little. The men understood the channels at places and would ride in and swim across. Was there again in 1868, in March. Went to the slough first at the lake, and came up the Buena Vista Slough; up the whole country. It was covered with water then. That was the year of the flood. In the spring of 1869, I was there in April or May, up and down the west side of the slough—up to Staten Corral. The water was high at that time. I crossed the slough at that time—swimming in some places. Was there long enough to make the round trip from 15 to 25 days. Next went there in 1873, First struck what is known as Fowler's Slough; it leaves the main slough a little north of the Tule House and went on to Bull Island. In places, the water was up to the sides of the horses. There was plenty of water and feed. The water was running in the slough at the time. I was there again in May or June, 1874; went to gather cattle. I crossed the slough, or one branch of it; water was running in it; I crossed the east branch that ran out by Fowler's. I was there again in the fall of 1873; the water was then in holes, not running. I was there quite a while, making surveys and making arrangements to build the Tule House. I was there again in the fall of 1874, but do not think I went to the slough. In 1875, I built a fence down there; we ran it to Goose Lake, and then due west as far as we could go, for Buena Vista Slough, and then stopped. We built 12 miles of fence north and south, and then 3 miles west into the slough. I was there a

month; the water was high; I did not cross it; I had no business across it; the slough was full of water. Was there again in the fall of 1875, to settle with the men. I was there again in 1876, in the spring; I was at the Tule House; there seemed to be plenty of water running in the slough there; spent the night at the Tule House. Was there again in the fall of 1876; I had pumps put in by J. M. Lewis, our foreman, in 1877, the witness who was on the stand yesterday. There was no water for the cattle. In 1865 the water channel was dry and we went up it to Tracy's Crossing. The channel was very plain—no trouble about a man following it up. Where confined, it was from 75 to 100 feet wide; in other places it spread out 100 or 200 feet. The slough from the Tule House to Goose Lake is on an average 75 or 80 feet wide, I should judge; pretty well defined; good bluff; hard banks. From the Tule House, going north, there is a well defined slough; after the spring freshets and the water recedes to the channel of Buena Vista Slough, three-fourths of the land along Buena Vista Slough can be traveled over by man and beast. If no water should run through Buena Vista Slough for two or three years, the land along it would be worthless, unless in a wet year. During 1877, we lost fifty per cent. of our cattle on Buena Vista Slough, caused by scarcity of water and feed, there being no water on the land to make feed. If the water was taken from that land for two or three years it would become like the desert land along the Calloway Canal.

W. CANFIELD

testified that he had resided in Kern County about eleven years; prior to 1874, on the north side of Kern River, in the neighborhood of Buena Vista Slough, two or three miles from the lower end of Kern River, on Section 34, Township 30 south, Range 26 east.

First came to Kern County in 1864, with Mr. Tracy; we had cattle, and camped on Buena Vista Slough, 30 miles north of Buena Vista Lake; camped there for three or four months, and during that time was going up and down the slough for 40 miles, nearly all the distance between the lakes. We then moved up the slough to a point three or four miles below Buena Vista Lake, from the north end of Buena Vista Lake. Stopped there three or four years. When we reached that point on Buena Vista Slough water was running in it. It was running in the summer of 1864. Water was running down Buena Vista Slough in the spring, but in the summer it was pretty well dried up for a long distance. I remained at Tracy's Crossing that time for about two months. I was again on Buena Vista Slough in 1866, in the spring. I was on the slough at Tracy's Crossing, and remained a month at work with cattle up and down the slough. There was a great deal of water in the slough in the early part of 1866. I was there again in March, 1867, and at the same place. I suppose I remained one and one-half months; was working on the slough at that time, along the slough to some extent. There was a good deal of water running in the slough in 1867. I was crossing the slough from time to time. Made the crossings in a boat near the Old Tracy Crossing. I was there again in the fall of 1869. There was a good deal of water in the slough at that time, and it was running northward. I came to the country to reside permanently in 1870. The water that ran into Buena Vista Slough from New River ran a part down Buena Vista Slough, and a part in the summer, when the water was low, ran into the lakes.

PHILO D. JEWETT

Testified: I was on Buena Vista Slough, at the Baker Dam, in 1865. Col. Baker was at the time building it. Was there again in July, 1876. The water was running over the dam at that time. It was July 2d that the dam was carried away, and I could not cross with my sheep.

CROSS-EXAMINATION.

The Baker Dam was at the outlet of Buena Vista Lake, 2 or 3 miles from the lake. There was quite a large sheet of water flowing over the dam. While the dam was there it backed the water of Kern River up into Kern and Buena Vista Lakes.

GEORGE RACINE

Testified: I have been engaged in the business of stock raising for 22 years. I first came to Buena Vista Slough in 1859. Struck it at Staten Corral, driving cattle, and remained there about a week, and went back to Tulare Lake. Was ranging my cattle along the slough, and crossed it. There was a little water in it, and running in places. That was in the spring—April, I think. We found places were we could cross without swimming. Was on Buena Vista Slough again in 1864, about the same time of the year; struck it at Tulare Lake, and went up as far as Staten Corral. Saw the slough at the time. The water was standing in holes. Next went to the slough in the spring of 1865. Struck the slough at Tulare Lake, and went right up to Tracy's Crossing. We were hunting up cattle. Was going up the slough, and crossing the slough. Don't know that I could tell how many times—too numerous to mention. I crossed at a great many points going up there.

There was no water in the slough at the time. After going to Tracy's Crossing I went back the same way.

Might have been 7 or 8 days making the trip back, and I was crossing the slough backward and forward at the time. I was next on the slough in 1867. I struck it between Tulare Lake and Staten Corral and worked right up the slough to Tracy's Crossing. The water was swimming. We were hunting after cattle—gathering cattle, rodeoing. I don't know but we were a month on the slough. I crossed the slough at Tracy's Crossing and then went back along the slough. Plenty of water in the slough then running north. Went to the slough again in 1868, in March or April. Struck the slough at about the same place; was gathering cattle. I was at Dover's hog camp a part of the time. I did go up to Tracy's Crossing that year. The water that year was very high, that was the year of the flood. I may have remained there a month or two. Next went to Buena Vista Slough in 1869 and struck the slough at the same place, then continued up the slough. I did not get to Tracy's Crossing. There was plenty of water in the slough at that time. I crossed the slough that year and it was swimming. I was there again in 1870 and struck it at the same place. We had a regular road to go backwards and forwards. Don't recollect how far up the slough I did go that year. I crossed it. There was not so much water in it as there was in 1869, but there was plenty of water. In crossing the slough we would have to swim in places. I was there again in 1871 at the same place. The water was low. I don't think it was running at all. I did not get there until late in the season, July, I think. I might have been there a week or two, I think. I was between Tulare Lake and Staten Corrall and was crossing the slough at that time. I was there again in 1872 and along the same country and on the same business, and I was crossing the slough. There was some water in the slough and we had to swim on crossing at some places. We had to swim down next to Tulare Lake at what is

called Mud Slough, at about Fowler Island. In crossing the slough that year we always found some places where we would have to swim.

I was there again in 1873 on the same business. I crossed the slough at that time. I was further up the slough that year. I came up to between Kern and Buena Vista lakes. Might have been 4 or 5 days coming up from Tulare Lake. I was coming along the slough, crossed it at Bull Island, and came up on the east side. At the crossing it was swimming. I returned the same way and crossed at the same place and found the slough swimming. Was there again in 1874 on the same business. I struck the slough that year at the Tule House. I came in from the east that year, and followed up the slough on the east side. Went up to Tracy's Crossing and crossed there and there was plenty of water. It was running north. After crossing there I went down the west side along the slough. We might have been 8 or 10 days going. I was camping along the slough and crossed at the lower end. Found a bad crossing there and had to swim. I was there again in 1875 on the same business, and struck the slough at the Tule House. Then went up the slough as far as Weed Island and camped there. The crossing was bad, swimming. Found two channels there, if I recollect right. I think there is an east and a west channel and a channel that goes right through Weed Island, a part of the way. I went back on the east side. I was there again in 1876. That year I struck the slough at Goose Lake, then went south along the slough. Went up opposite Weed Island.

The next time I went there was the next year, 1877. I struck the slough that year at Tracy's Crossing and went on down as far as the Adobe Holes, then came back to Tracy's Crossing again. There was some water at Tracy's Crossing. Below there was not any. I found Mr. Briggs at the Adobe Holes. They had some

eight or ten pumps that season, pumping water for cattle. I think forty per cent. of the cattle along Buena Vista Slough died that year, from want of feed and water. I went there again in 1877, in July, and worked until October. I was driving cattle to feed. I went to put in pumps in June, but was taken sick. The pumps were running all the time I was there.

I was not there in 1878.

In 1879, I was there about a week; at the Tule House, gathering cattle. There was some water in holes, and they were running some pumps.

I went there again in 1880, April, I think, and remained about a month, gathering cattle. I was crossing the slough that year. I could not state at how many points I did cross it. Below the Tule House there was no water. The water was coming down in the sloughs, but had not got that far. I think that was in April. I was there in May also. I think I did not cross, clear across the slough that year, only on to the islands. In crossing to islands, we had to swim. I went on to Broder Island, and I think Weed Island. I was back there in the fall of 1880, for a few days, on the west side with cattle.

I have been there this year, 1881, in January, and remained about ten days. The water was standing in holes—no running water. I was about ten miles below Dover's hog camp, and down to Tulare Lake. I could not say at how many different points I have crossed this slough, running through that swamp land, during the time I have been on it. On nearly every section, I think. It is a well defined channel running through this body of swamp land from Buena Vista Lake to Tulare Lake. I could not say how deep it is; in places where there are steep banks, such as there is from Buena Vista Lake, down to Norton's Camp, some places there, it would be eight or ten feet deep, the banks, and in some places less. Some places be-

low, before we got to Weed Island, were very steep banks, eight or ten feet high. Then you came to the banks that are sloping banks, and the water would not be over five or six feet deep. It runs on in that way clear through. There are two channels from opposite Goose Lake to Tulare Lake. The east channel is from three to ten feet deep, and there are places fifteen feet. It is from eighty to one hundred feet wide. Parts of the west channel are larger. It averages about the same, I think.

JESSE DOVER

Testified: I live on the swamp on Buena Vista Slough, at a place known as Dover's hog camp. It is 15 or 16 miles from Wible's Camp, and about on Section 1, Township 29 south, Range 22 east. I went there in July 1876 to raise hogs, and have been in the hog business ever since. I ran my hogs on the country around there on Buena Vista Slough between the Adobe Holes and Weed Island. I have been there with my hogs ever since I went there, taking care of them myself. In going through the body of swamp land I have been acquainted with the slough or channels running through the land for a distance of 15 or 20 miles, both ways, north and south from my camp. I worked my hogs north to the Adobe Holes, about 14 miles, and ran them south 7 or 8 miles. Between these points there is, in some places, a big, fine slough, and at other places it is not very deep. In crossing the swamp between these points there are places where you will find but one slough, and places where you will find three. The average width of the main slough from the Adobe Holes to this point, 7 or 8 miles above my camp, I should think, is between 60 and 80 feet, and average between 3 and 10 feet deep; in some places 3 feet, in other places about 10 feet. I could not say that I have been over every section of land along that country. I am

in that swamp every day that I am at home. If there is a spot there I have not been over I don't know it. If water is turned into Buena Vista Slough, there are places down there where it will overflow its banks before it will go through. There are lower banks, a wide slough and no perpendicular banks; it will back out, but no great distance. There are places where it will back around 300 yards before it will go through. When I went there in 1876, July, there was plenty of water. It was running in the slough. I forded it with a team. There are shallow places in the slough between the bridge and Tracy's Crossing, and the water there is up to the wagon-bed, and, I think, 150 feet wide.

I was there in 1877. I should judge that one-half the cattle that were in the swamp in 1877 died; I saw them dying. The cause of their death was want of water and feed, I suppose.

There was very little water in 1879. It came down about three miles this side of Wible's Camp, I think, and ran a few days to Weed Island. There were ten or twelve pumps running there, those being run by Cox & Clarke and Crocker. Pumps were run in 1879 by the said firm.

J. PENSINGER

Testified. I reside on Section 8, Township 30 South, Range 26 East, close to New River, one mile from it. I have resided there since 1873. There has been no change in that channel where it passes my house, since 1873.

I was first on Buena Vista Slough in 1872. I crossed in a wagon; forded twice. I saw a ferry boat there in December, 1872; it was 16 or 18 feet long and 6 or 8 feet wide; a kind of a scow. I started down the slough with it. I don't know exactly how far I got—5 or 6, perhaps 8 miles. I started between Tracy's Crossing and the camp. I tied the boat and left it. I

did not take it back, because the current was so strong that I could not tow it back. I was below that point on the slough in 1874. I think 20 or 30 miles below Tracy's Crossing. There were a lot of islands down there. I was hunting wild hogs. I was in there at different times; 3 or 4 days each time. I went several miles along the slough. The first time in June or July, 1874; the water was high in the slough. I was on the east side, and went in on the islands. Made the crossing by swimming. It was 60 or 80 feet wide, I suppose. Could not say how many times we crossed through to the islands. We crossed frequently. I was there last in November or December, 1874. The water was lower there at that time. It was mostly confined to the sloughs, and we had to swim then. The water was running both times we went there—north. I have been frequently on Buena Vista Slough since.

CROSS-EXAMINATION OF J. PENSINGER.

I have crossed the slough frequently since 1874. I have crossed it every year from 1875 to 1880. At times have found water and at other times it was dry. I was there at different times in 1875. Could not say how often I crossed in 1875. Could not tell whether it was dry at any time in 1875. I was on road matters, and did not pay any particular attention.

In 1875 I crossed in several places. I have crossed along where Wible's Camp is, at Weed Island, and higher up. Since 1874 I have oftener found it dry than I have found water running.

M. ROGERS

Testified: I first visited Buena Vista Slough in 1858—September—on a hunting trip along the slough. First struck the slough 8 miles above and south of Tulare Lake. We came up the slough, probably 10 or 12

miles. Camped one night on the slough, and then came up the slough 10 or 12 miles, and camped two nights. The water was low; just stood in holes.

Was on the slough again in November, 1858. Struck the same slough, about where Wible's Camp is. I was there 4 or 5 days. The slough was deep; had plenty of water running at the time, north, towards Tulare Lake. I went along the slough to Buena Vista Lake from where I camped, 5 or 6 miles below. I was hunting elk at the time. Crossed on horseback 3 or 4 different times; by picking shallow places in the slough we could cross without swimming.

I went there again in 1863, moving cattle. I struck the slough about where Dover's Camp is. I was there a week. Then I went back and brought another band of cattle. There was plenty of water there when we first struck it in 1863; April, I think. I think it was some time in May when we got back with the second drove. Struck the slough at the same place, and turned the cattle loose, and then came up the slough a little above Wible's; built a tule house, and camped there to keep the cattle from going up towards Buena Vista Lake. Was there about a month. I did not, during that time, go below Dover's Camp. We were running the cattle between those two points. There was plenty of water running there at the time, but I do not think it ran but a short distance below there. I did not go to the lower end of the water. The water was falling at the time I went there.

I went there again in 1864; brought cattle there. When I got there the water was pretty well dried up. No running water; standing in holes. I remained about six weeks along the slough. I got there in the early part of the season; about April.

I was there again in 1865 with cattle; was on the slough all the way from Tulare Lake to Buena Vista

Lake that year, gathering cattle and taking them back. In 1865 there was considerable water at the upper end of the swamp and in the slough down to the lower part of it; I was there twice in 1865; in the spring and fall. I was crossing Buena Vista Slough, I could not tell how many times—various times and at various places; crossed at Tracy's Crossing and at several places down through the tules. Some places we had to swim and in some places we crossed without swimming.

I was there again in 1866, in the spring, gathering cattle. In 1866 there was plenty of water there; I was there about 8 or 10 days along the slough; we camped on the west side from Tracy's Crossing down as far as Dover's place, gathering up cattle. I was there also in the fall of 1866, about the same length of time, perhaps a little longer, branding calves and gathering up cattle. Crossed the slough in 1866 at different places.

I was there again in the spring of 1867, gathering cattle and branding. I was along the slough about two weeks. Commenced at Tracy's Crossing and continudown the slough towards Tulare Lake. We crossed the slough in several places. There was plenty of water there then.

I was there next in 1874; I passed through; did not stop. From 1859 to 1867 I was at work for Thompson & James, of San Luis Obispo County. In 1874, I crossed the slough at Tracy's Crossing; the water was pretty deep, but not swimming. It was in June, I think.

I was there again in the spring of 1877 or 1878. I think it was 1878. I was at work for Mr. Flint, of San Luis Obispo County. There was water in the slough and pumping going on. I did not stay very long. I was gathering up cattle and working cattle. I was there probably a week or ten days. I think Mr. Crocker, and Cox & Clark had pumps running at the time. There was one on Weed Island and one at

Dover's Camp. I was along the slough about two weeks. The water was very low; standing in holes.

I did not go there again until the spring of 1880. Crossed the slough at Wible's Camp. Water was running in the canal, but it was not very high. It was in July.

I have been there this year (1881), about April 1, down by Wible's Camp, and along the slough pretty nearly to Tulare Lake. Was down to what is known as the Tule House. The slough down there was big, considerable water in it; no running water. I saw running water at Wible's Camp. It was running in the canal and out of the canal into the tules. It was about 4 or 5 miles below Dover's Camp. The slough down there that I have crossed during the years I have been down there, would average from 60 to 90 feet wide, I should think. In places it is deeper than others; but take it the length of the slough I think it was from 5 to 6 feet deep. When I have seen water running in that slough it has always been running north.

CROSS-EXAMINATION OF M. ROGERS.

I saw water in Wible's Canal; considerable of it. It ran into the tules. I should think 60 or 70 feet wide. Could not say how deep; do not think over 3 or 4 feet; it might be one and a half feet deep. It went into the tules. The slough from Goose Lake to the Tule House will average 5 or 6 feet deep. I have crossed the other parts of the slough at various places. In some places it is deep and in some places shallow. I have not seen the channel where it is several hundred feet wide. I know it is a channel by seeing water running down it, and where the water aint running down through, a person can see the channel by the places on the tules where the water has run, and the tules have not grown up. I have traced out channels along

through there where the water was, and have hunted shallow places to cross when the water was up. I never traced a continuous main channel all the way from Wible's to Tulare Lake. I have traced it from Goose Lake to the Tule House. It was a continuous channel there. When I have crossed there when the water was up I have found the water running a pretty swift current. I have crossed what we called the main channel, where the main current of the water ran, and it would be not more than 2 or 3 feet deep; in other places it would spread out, and not so deep.

T. W. BARNES

Testified: I first came to Kern County in 1861; to Kern Island first in 1863. In 1863 the waters of Kern River ran in the South Fork and Old River.

In 1877–8, the water changed to New River and Goose Lake Slough. Since 1868, New River has been the main channel.

Between 1863 and 1868, the waters, after passing into Buena Vista Lake, went down Buena Vista Slough in the direction of Tulare Lake, north.

I was on Buena Vista Slough first in 1863. It was a large stream, nearly from bank to bank. In low places it was running over. At that time I followed Buena Vista Slough for about 10 or 12 miles below Tracy's Crossing, and about opposite Weed Island. I was working with my hogs.

I was on Buena Vista Slough in 1864, along in May. I got back to my place May 4. I was there on and off every week or two. I was there that year from time to time. I don't think there was any month that year that I was not on the slough. The water dried up considerably. It was quite low. I was down perhaps 3 or 4 miles below Tracy's Crossing that year, about the head of Weed Island.

In 1865 I was there first in January or February. I was from the lower end of Buena Vista Lake down to Weed Island. I was on the slough a good many times in the summer. I have seen the water all dried into holes.

I was there during the spring or summer months of 1866 down to Goose Lake and back. There was a great deal of water in the country at that time. I was there in April, May or June. Along in the fall there was considerable water in the swamp. I was along the slough between Goose Lake and Buena Vista Lake in July and August. It was after the Baker dam had washed away, and there was a great deal of water there.

In 1867 I was along the slough at different times in the spring. I still had my hogs there. I could not say positively that I was there every month in the year, but I was there off and on. There was considerable water in the country in 1867.

I was there in 1868. There was more water then than I wanted to cross.

I was there in 1869. I could not tell how many times, but several times. I think I was down the slough as low as Goose Lake, working back and forth with my cattle and hogs.

I was on the slough in 1870. I don't think I was below Weed Island in 1870.

I was on the slough in 1871. The same business. There was plenty of water there in 1871. In May there was a great deal of water in that country. Could not say how many times I was on the slough in 1871. In August, 1871, I was Superintendent of the Buena Vista Ditch, and turned all of the water of New River into that ditch.

I was on the slough in 1872. Probably went down to the same point to Weed Island. I was not there every month in 1872. I have crossed on to Weed

Island and Broder Island, at different stages of water, and when it was perfectly dry. Crossing to Broder Island the highest water, swam my horse. When I went to Weed Island, the deepest water I found was about breast high. I left my horse on the other side in 1866, and went on to Weed Island, and the water struck me about shoulder high. I also crossed on to Weed Island in 1872. The deepest water I found was 3 feet. There was a great deal of water there in 1872. I was on the upper end of the slough in 1873. Don't think I went down to the island.

In 1874 I was not far down. Don't think I went below Wible's Camp. I was on the upper end of the slough; went down to about Dixon's and Wible's Camp, along there.

I was there in 1876, at Wible's Camp. Don't think I was two miles below Wible's Camp.

I was down there in 1877. I was freighting there for the Company, probably down the canal 20 miles. Crossed the slough every 8 or 10 days, going to the camp with freight. The slough was dry—no running water.

In 1878 I was down there, at the upper end of the island. I was only on the slough from Wible's Camp along up towards the lake. There was some water there in the spring of 1876.

In 1879 I was at one time at Wible's Camp; I think along in the spring.

In 1880 I was down the slough as far as Dixon's once or twice during the summer.

I have crossed Buena Vista Slough between Tracy's Crossing and Goose Lake, at the Canal Camp, at the upper end of Weed Island. Have crossed Weed Island, the sloughs going north of Weed Island, and alongside of Weed Island on both sides from the De Webler place. In making these crossings I have found the water deep enough to swim almost anything—

deeper than I wanted to go through. I have found the sloughs swimming, and have found them dried down into holes. When the water was running full it would swim almost anything. I suppose the widest channel there is 60 or 100 feet wide, opposite Weed Island. The main channel of the slough would be from 60 to 100 feet wide. I could not say exactly the width, because I never expected the question to be asked me.

Buena Vista Slough is a well defined channel down to the head of Weed Island. There the channel was choked up in 1867–8. It was overflowed by logs and drifts. The channel choked up there. The drift was right on the upper end of Weed Island. It consisted of pine, redwood and spruce, such as grow in the Sierra Nevadas, driven into here by the overflow of 1867–8, the same as thousands of other drifts in the river here. I saw logs there when I first found it two feet in diameter and of various lengths. Before that drift formed there the main channel ran right along Weed Island. After the drift it broke off into two separate streams, one to the east and one to the west, to the low ground. From Weed Island to Goose Lake I have found the channel nearly every place I crossed it. I never followed it directly from there to Goose Lake, but I have struck the channel at different places. I have found the water running north, or west of north. From Buena Vista Lake to Weed Island I think the channel would average about 200 feet wide. It is a supposition with me; I never measured it. When full down there it would be from 20, 16 or 18 feet deep, and from that down to 4 or 5 feet. There are places where I am satisfied it would be 20 feet when bank full, when running over the banks. The main channel opposite Weed Island is, I think, all of 100 feet wide, and probably more. I never measured it. I have seen the crossing, and have crossed when I had no team and probably when it was dry. I know it is a great

deal larger there than my pole and wagon and all, when I had a long hay frame on my wagon, hauling hay. When full, the water in the channel was of various depths, like all streams, some places deeper than others, but deep enough to swim a horse when even banks full.

Every year from 1863 to 1879 the water ran out of Buena Vista Lake down Buena Vista Slough. That was the only outlet.

CROSS-EXAMINATION OF T. W. BARNES.

In 1870 there was considerable water down there in the summer.

In 1871 there was plenty of water there also.

In 1872 I think there was considerable water along there; more confined to the channel; not quite so much as in 1869, 1870 and 1871.

I imagine there are shallow places where the water would run out into a portion of the swamp land before it connected in the channel, as in all streams. Now, Kern River spreads out all over the country at a high period of water. I found the water all over the swamp at high periods of water, and at other times I found it confined to the channel and in holes. When the water was running, swimming, as I speak of, it was over a great deal of the country, the same as Kern River is, or any other stream. It overflows its banks and spreads out over a large scope of country. I cannot say that there is a channel all the way to Tulare Lake. There is a channel there, but I never followed it clear through. I have crossed at different points; at places there are two or three channels. I never saw the water run from Tulare Lake back into Buena Vista Slough, but I have seen it run the other way. In all rises of the water you will see it running to the north; when rising, it will run in that direction, and, when falling, it dropped back into the holes in that deep slough. In

1880, the whole of Buena Vista Lake drained down into the channel we call Buena Vista Slough, between Buena Vista Lake and Tulare Lake.

Ever since I have known Buena Vista Slough, I suppose it has always got the major part of its supply of water from Kern River. I have always found that Kern River carries its waters into Buena Vista Lake, Kern Lake and into the slough. The water at present running into Buena Vista Slough comes from Kern River. The South Fork empties into the Slough, and then runs into Buena Vista Lake until it fills up, then it runs down Buena Vista Slough. The water of Kern River that ran down the old South Fork into Kern and Buena Vista lakes, after the lakes were filled, would run down Buena Vista Slough, down the channel. When the water ran into these lakes from the branches of New River, the water, after the lakes were full, ran down Buena Vista Slough. I know of no other outlet. Buena Vista Slough, in high water, overflows its banks at the usual spring freshets, when the waters are running down from the melting snow. Whenever the spring rises come, there are places where it will spread out and get out of its banks and run off towards Buena Vista Lake.

CHARLES D. GIBBS,

A civil engineer, and deputy United States Surveyor under Surveyor-General Hayes in 1853–4, surveyed the land along Buena Vista Slough in 1854. He then crossed Buena Vista Slough five or six miles north of Buena Vista Lake. The channel was one hundred feet wide and was bank full; the water was running north; we worked all day crossing it. It was the narrowest place in the slough, and water was 25 or 30 feet deep. The current was pretty steady; strong current; swam bank full; not a rapid current. That was in May, between the 22d and 24th. I also struck

the slough in running the line between townships 26 and 27, range 22. I put it in my field notes as a very deep slough. There was water in the slough, running north.

He found the slough 264 feet wide, and gives his notes in full as to just what he found, and he locates the slough on section 4, township 27 south, range 22 east, just where McCray located it on his diagram from a survey made 26 years afterwards.

He found another slough between townships 27 and 28 south, range 22 east, and he produces a map, showing such slough. (Plaintiffs' Exhibit 6.)

And at this point we introduced in evidence the plats of Government surveys, showing the line of Buena Vista Slough, as located in 1854, and also of Kern River, with figures at the section lines, showing the width of Buena Vista Slough and Kern River at the crossing of such lines, data which United States Surveyors are required to give. Also with arrows in the stream to show which way the water ran, the head of the arrow pointing down stream, showing Buena Vista Slough to be 490 links wide (324 feet), where it leaves Buena Vista Lake, 307 or 317 links (204 or 211 feet), where it crosses next section north line 412 links (274 feet), where it crossed the north line of the township. The plat of township 30 south, range 25 east (Exhibit 15), the survey was made September, 1853, and January, 1854, shows the slough where it crosses the line of section 31 to be 318 links wide (211 feet).

And on cross-examination, pages 356 to 363, he fully explains the sloughs he found in making suvreys in 1854, giving width and depth of water.

PROFESSOR GEORGE DAVIDSON,

United States Commissioner of Irrigation, and who had made an examination of irrigation in Japan, China, India, Egypt, Italy, etc., and who had examined fully into the question of irrigation in California, and the source and course of the prominent rivers of California, including Kern River, testified that Kern River rises in the Sierra Nevadas, that its present course from Bakersfield is southwest into Buena Vista Slough; that after entering Buena Vista Slough its general course is north-northwest, in the line of the course of depression of the valley of California, through Tulare Lake. That he had made an examination during his present visit of the way the waters flow from Kern River into Buena Vista Slough. It now flows into Buena Vista Slough through one fork called the South Fork. At Buena Vista Slough a part of the waters flow southward into Buena Vista Lake, and a part going to the north-northwest through Buena Vista Slough. That he measured the water, and found a little over 300 cubic feet per second flowing north northwest, and 400 cubic feet per second flowing southward into Buena Vista Lake. He gave the elevation of Kern and Buena Vista lakes at 290 feet above the level of the sea.

When the flow of water from Kern River fills Buena Vista and Kern Lakes, the water will then flow north-northwest, and *there is no other outlet* from Buena Vista and Kern Lakes, except north-northwest, through Buena Vista Slough. The difference of levels between Buena Vista Lake and Tulare Lake is about 100 feet, and the distance 52 or 53 miles in a straight line. The flow of the water of Kern River from this Kern River Valley is south-southwest, until it reaches these two lakes, or the connecting stream; then the flow of water is north-northwest. Kern and Buena Vista Lakes have no other

source of supply other than Kern River. In wet seasons there might be a small supply from the San Emidio Cañon, from Tejon Cañon, or from the Tehachipe. The other sources of supply do not amount to anything.

MILTON NORTON

Testified: I reside on Buena Vista Slough, about a mile and a quarter below Headquarters, or Wible's Camp, on Section 15, Township 30 south, range 24 east. I have resided there for two years last fall. Am engaged in running hogs there, and farming some. I am cultivating land there, a part of section 10, in the same township. I think it is the southwest quarter. I have been acquainted with Buena Vista Slough since 1875. I crossed it, going backwards and forwards to the Templor Ranch. We used to cross at the Old Tracy Crossing.

During 1875, I probably crossed three or four times a month.

In 1876, I was crossing backwards and forwards, going to the Templare Ranch.

In 1877, I was in the swamp along Buena Vista Slough. I was located about three miles above Dover's Camp, three miles up the slough. Commenced pumping there in June, 1877, aud pumped until March, 1878. I was attending to the pumps and pulling cattle out of the mud holes along the slough, from Wible's Camp, down about twenty miles. That would be below the Fish Pond. During that time I was crossing the slough from one to ten times a day. I had to go to all the camps. I went back to the slough after March, 1878, in August, 1878, and then located where I am now living. My business has been raising hogs and farming some. I ran my hogs from Wible's Camp down to the lower end of Weed Island, probable three-quarters of a mile below Bonestell's. When I first saw

the slough between Buena Vista Lake and the place three-quarters of a mile below Bonestell's, it was dry. I think it would average between those points where I first saw it, 125 feet wide, and 12 and 15 feet deep. The banks for some of the distance are steep, and only at places you can cross. When the slough was full of water and we wanted to cross between Tracy's Crossing and Bonestell's house, we generally had to swim it. It is not an easy stream to cross, but a very difficult one. The slough runs within fifty feet of my house. There has been no change in the bed of the slough at that point since I have been there.

Q—Does the slough run through the land that you are on there, the west half of Section 10?

A—Yes, sir; I don't know as I can describe where it runs through Section 10; it crosses the southwest quarter and crosses the line. We built a fence on the line. It runs north and south and we had to cross the slough several times. The slough also crosses the northwest quarter of section 10.

I have seen the slough between Buena Vista Lake and Bonestell's house when it was all dry, except in the water holes. At such times I think it would be six feet down to the bed of the slough, or the water. I think you would have to run six feet of water in that slough before it would overflow its banks. I have been along the banks of the slough recently, between Buena Vista Lake and Bonestell's house—last Thursday. First struck the slough at the Bonestell House and followed it up to where I live. I should judge it is eight miles south of Bonestell's to where I live, following the slough. There was water in the slough when I followed it, I think about three feet deep. It was not overflowing its banks at any place. I went along on horseback, and kept right along by the side of the slough all the time. Did not cross it between Bonestell's house and the camp.

The slough was the same or about the same as when I first saw it. There was a current of water in the slough above Bonestell's house. I was on Buena Vista Slough north of Bonestell's house last Thursday. I went about fifteen miles north of the Bonestell house. There was a current of water in the slough, running for a mile below Bonestell's house. Where it ceased running the slough was not very deep; the water was twenty feet from where it stopped running, was a foot deep and ten feet wide. One hundred yards from where it stopped running the slough was one hundred feet wide. We found water running again about four miles below Dover's, at the break in the canal. The slough along that distance where it was dry was about one hundred and twenty-five feet wide and from three to four feet deep on an average. I have seen water running through that slough between Bonestell's and the break in the canal. Saw it running down the slough last February. I saw it running down the slough between Bonestell's house and the break.

Q—How much water was running down in February last?

A—Well, there were places where we crossed it, it was half side deep to a horse; other places it was probably three feet. It was not overflowing its banks.

We struck the slough (last Thursday) about a mile below the Adobe Holes. We found a stream of running water. We followed it until it ran out about three miles below the Adobe Holes. Where the water stopped running in the slough it was about one hundred feet deep. I stopped there. I have been below there, I think, in the spring of 1878. I have followed Buena Vista Slough from the break where the water runs out of the canal to the Adobe Holes. The channel along there is probably 125 feet wide and from three to five feet deep.

I have been on Buena Vista Slough with a boat from Wible's Camp north on the slough, probably three and a half miles, following the slough.

When I followed the slough, last February, from my house down to Dover's, the narrowest place where the water was running must have been fifty feet. At the drift pile the channel divided, and the west channel is the widest, probably 150 feet wide. All the channels except one come together again, about one mile below the drift pile.

I have been on the channel running on the west side of Weed Island, above and below Dover's, and where the water was running in it. From where it leaves the head of Weed Island to Dover's, the channel on the west side is probably 125 feet wide in some places; in some places more. I should think there would have to be three feet of water in the channel, on an average, before it will overflow its banks. I have been on Buena Vista Slough, above Headquarter's Camp; I have seen the water running into Buena Vista Slough from Kern River from both its branches, one coming in abreast of the point where Buena Vista hills strike the slough, the other up at the old bridge.

The water that ran into the slough from the most northerly branch, after entering Buena Vista Slough, runs north-northwest down the slough. The water that runs into south branch divides after reaching Buena Vista Slough, part running into Buena Vista Lake and part down the slough. I first saw those points in 1875 and 1876, and have often been up there since. Every time I have been at the north branch I have found the water running from that branch into Buena Vista Slough, running north and northwest. I never saw it running in any other direction.

Q—How many places are there on Buena Vista Slough, between the Old Tracy Crossing and Bone-

stell's house, that you can cross the slough when it is bank full?

A—Well, if we want to swim, we can cross most any place, except down below the drift pile there.

Q—How many places are there, when it is bank full, that you can cross it without swimming?

A—Well, sir, I think there would be one place probably within a mile of the Bonestell House—a mile south. I have crossed the slough at Bonestell's house within a month. The last time I crossed I do not think the water was running. I have crossed there this year when the water was running, and the water was between three and four feet deep. That was in February or March; the slough was not then overflowing its banks where we crossed. When the water gets high it runs out in different channels and comes back into the slough again. The water would have to get three to five feet high, I guess, before it would flow out into the side sloughs, and when the water recedes in the main slough and becomes only two or three feet deep, the water runs out of these side sloughs into the main slough. The beds of the side sloughs are higher than that of the main slough.

CROSS-EXAMINATION OF MILTON NORTON.

At the drift pile, above Weed Island, there is not much difference in the depth of the channels. The water has got to raise in the main channel before it will go through the west channel. I should think about 3 or 4 feet. I think the width of the mouth of the west channel is about 125 feet; the banks are sloping. It is probably three or four feet deep in the center, sloping back to nothing. It would have to go back one-half of 125 feet. I can find it when there is no water in it. You could find it by its being like a slough. It looks like a water course. It is from three to four and a half feet deep in the center, and banks sloping back

probably 125 feet. The banks slope back 62½ feet from the center, and rise 3½ feet, I think. A person would find it the same as he would find any other slough, or water course, or river; find it as well as you could find Tule River or any other. It looks like a channel. Water will run there because it is a slough. The eastern channel from this driftwood is from three to five feet deep; in some places more. It continues for a mile, I think. It is more defined than the western channel. It looks like a slough where it leaves the driftwood; higher banks to it than to the other. At the mouth, I should judge from four to six feet high, the slope on an average of 35 degrees, I guess. At this point I could not say which is the main slough—the center, east or west. If water is turned down there I could not tell exactly which channel it would first take. It will either take the middle one or the north one; that is the one to the right as you go down. The water was running in both of them last Thursday. It was not running on the west side of the slough, at Bonestell's. I did not cross to the east side. I followed right up the slough on the west side. The main channel, the middle channel, the one that runs down by Bonestell's, is well defined. I call the middle channel the main channel; that is better defined than the east or west channel. From the drift pile there are three channels. They come together again about a mile from there except the west channel. The middle channel at that divide is probably 50 or 100 feet wide; may be more. The banks are not perpendicular. Probably in going 20 feet you would come to the bank from the bottom. The water was running down about a mile below the Bonestell House last Thursday, near the end of Weed Island. The Bonestell House is on Weed Island, between the main channel and the west channel. The water was last Thursday in the main channel down to the north end of

Weed Island. There was no water in the west channel at all. The east channel comes back into the center branch at the south end of Weed Island. The waters of the two channels join together about a mile below the drift pile, and were joined when I was there last Sunday.

RE-DIRECT EXAMINATION.

The east and main channel run separate about a mile, and come together three or four miles above Bonestell's. My crop this year is on Section 10—the southwest quarter. I lease the property from Miller, Lux and Crocker.

ROBERT BURGAN

Testified: I have been on Buena Vista Slough. I was there at work for Mr. Crocker. I went there in the spring of 1875. Don't know how long I remained. I was at work along up and down the swamp. I believe once or twice in the spring. I think I was there about a month, each time. I was working with cattle. I was there in the fall of 1875, working for the same length of time. I was working from the head of Tulare Lake to Tracy's Crossing, and was crossing the slough at different points. Sometimes I would cross once or twice in working backwards and forwards. During the whole season of 1875 I suppose I crossed 8 or 10 times.

I was there again in 1876, working stock. I was there from sometime in June, about four months, working with stock from Tulare Lake to Tracy's Crossing, and crossed quite a number of times.

I was there again in 1879; I got there in March, I think. My first work was putting pumps, I think I had seven put in. Was working for Mr. Crocker. I was there pretty nearly all the year.

I was there in 1880, running two pumps and working

with cattle between Tulare Lake and Tracy's Crossing. I crossed the slough a number of times. I was working for Mr. Crocker. There was no water at the lower pumps, below the Adobe Holes. I don't think it ran below Dover's in 1880, but I am not sure, as I was not there all the time.

There was no water at the Adobe Holes, when I went there in March, 1879, and I don't think we got any until the spring of 1880. No water in 1879, except standing in holes. I think I saw water running all the distance from Buena Vista Lake to Tulare Lake in 1876. I saw it running when I was on the slough. I suppose I was on the slough at fifty or one hundred different places. Where I crossed I always found sloughs. In 1876, the water was running in the sloughs where I crossed them; the water was running north. I would say the slough from Tracy's Crossing to the Tule House, would average eighty or one hundred feet wide. The water would be generally six feet deep where I made my crossings. At the lowest places I have been on the slough, it would be two feet deep. That would be the shallow places in the slough in the channel. When the sloughs are full of water, and the water is confined to them, we could run and feed our cattle on all of the land, except one-sixth. The slough on the east side from Salt Slough to the Tule House is about one hundred feet wide, I think, and will average I think six feet deep. I never rode through that channel all the way. I have been right along the edge of the channel and been in it for quite a distance in places.

Q—Can you travel in the channel between those two places?

A—I think a man could.

S. W. WIBLE,

Superintendent of the Kern Valley Water Company, testified: I have resided at the Headquarters of the Company, on Buena Vista Slough, referred to as Wible's Headquarters, since the fall of 1876.

When I went there, there was considerable water running in the slough. Kern River ran into Buena Vista Slough at that time in three branches, but I do not think water was running in all of them. The main branch is the central one, and carries the most water, and comes in right at the point of a hill. The north branch is a little north of that, and when I first saw it in the latter part of 1875 or of 1876, the water was running in it, 20 or 25 feet wide. The water running into Buena Vista Slough from the north branch, would, after entering Buena Vista Slough, run northwest down the slough. I first saw water running down the center or main channel in the fall of 1876. Such water, after entering Buena Vista Slough, ran north through Buena Vista Slough. I first saw water running through the south channel in the fall of 1876. The water, after entering Buena Vista Slough, was at that time running north. Ever since 1876, when the water has run into Buena Vista Slough from the north or from the center or main channel, it has always run north. At the point where the water running into Buena Vista Slough from the south channel divides, a portion runs into Buena Vista Lake, and a portion north through Buena Vista Slough. I have been down Buena Vista Slough from the Old Tracy Crossing to Tulare Lake, 2 or 3 or 4 times. I last went down in 1877. I cannot say how many times I have been down Buena Vista Slough from Tracy's Crossing to the Bonestell House. I think I have been down there every year since I have been on the works.

Q—What kind of a slough or channel is that from the Old Tracy Crossing to the Bonestell House?

A—It is a deep channel on an average 7 or 8 feet, and very much deeper in places. I have found places where it was 20 or 25 feet deep. It is from 5 to 150 or 200 feet wide. I have been down that channel in a boat, but not far below Headquarters, a mile or two. I know where Mr. Norton lives who was last on the stand, and know the channel where it runs by his house. At that point the channel is 125 or 150 feet wide. I know the channel where it runs through the northwest quarter of Section 10, that Norton is on. It is at that point 50 or 60 feet wide, and in some places 100 feet wide, I think. I have also crossed the channel of Buena Vista Slough. I have crossed it above Headquarters. I used to ford it there and at Tracy's Crossing. I have often crossed it. I have crossed it below Headquarters and right at Headquarters, and have crossed it to Weed Island. We had an old crossing there on Weed Island. I have crossed at the Bonestell House, just above his place, on Section 24. I have crossed below there, could not say where, but just as my business required my crossing back and forth. I have crossed at a great many places below Bonestell's. I made two crossings there for the purpose of hauling freight for Delano. I was last on Buena Vista Slough south of Bonestell's house, two days ago, the 24th. I crossed at the Bonestell House. The channel at the Bonestell House, where I crossed it, was 40 or 50 feet wide. The water did not come right into the buggy; I should judge it was 3 or 3½ feet deep. From there I went right up to Headquarters; followed the channel right up, driving right along the banks in most places. Once in a while would come to a bend and strike across; this would be but a short distance; might be 100 yards. There was very little of the channel but I could see. In going from Bonestell's house to Headquarters, there might have been a quarter of a mile of the channel that I did not see. There were but two

places where the water had run out of the channel; one place I went around it and the other I crossed it. At this place it had just run out in a high water channel just enough to wet your feet; it might have run out two or three hundred yards; where I crossed it, it was a stream probably 6 or 8 inches deep. The water was also running out of the slough at the head of Weed Island; it was the west channel, and the water probably a foot deep there; it was the mouth of the west channel, and the water was just entering into it; after passing that point I saw no water out of the slough. The distance I drove along the slough, following its meanderings, was probably 12 or 14 miles. There was quite a body of water running in the slough where we crossed it below; there was three and a half feet of water, anyhow—running water. The slough is deeper as you go up towards Headquarters. I was on the channel west of Weed Island, last Saturday; I crossed it right where it leaves the slough, or close up there. I have been on the western channel since then. I first drove on to the bank of the channel near the Adobe Holes, about 8 miles below the Dover's camp. There was water in the channel there; I don't know how deep, but I suppose 5 or 6 feet in the Adobe Holes. There was plenty of water running north. I drove right along the bank at the Adobe Holes; there was lots of water there, wide and deep and running. I then went and struck the slough or channel at Miller, Lux and Crocker's Camp, about four miles below the Adobe Holes. The channel was dry there, no water running, and I followed it a little way, and next struck the channel at Epperly's Camp; that is three or four miles from Crocker's Camp. Then I followed the channel right on from there; it was nice driving right in the channel; must have followed it some three or four miles; the channel was wider and deeper than where I first struck it. From where I first came to it to where I left it, it would

average, I guess, a good deal over 100 feet wide; the average depth to the point where it was dry was 4 or 5 feet in some places, others 10 feet. The point where I first reached the slough and found water was on Section 20, Township 27 south, Range 22 east, and the first point I found no water was on Section 31, Township 26 south, Range 22 east. I followed the dry channel to a line between Sections 24 and 15, Township 26 south, Range 21 east—some three or four miles. There was no running water, but water standing in a big, deep channel. I followed it to Section 36, Township 25 south, Range 21 east, and from there I went to the Tule House. The channel that ran from the west channel to the Tule House was from 50 to 75 feet wide, when I made a note of it and was deep. It was a deep big channel at its intersection. I did not follow it. At the Tule House I followed the eastern channel. Water standing there; no running water. From the Tule House I followed up the eastern channel, down right in the channel, in the bed of it. After driving about half a mile from the Tule House, I drove into the bottom of it, and then followed right up the channel. I drove two hours until I came to running water above Salt Slough. It might have been one and a half or two miles on a direct line above Salt Slough where I came to running water. That would be somewhere on Section 33, Township 26 south, Range 22 east. The channel where I drove along was dry and very fair driving at the bottom of the slough. A very nice, even channel. From the Tule House to where I found the water, I should judge the channel would average 75 or probably 100 feet wide. There was no growth in the channel except a little duck clover or sweet weed, or something of that kind. I drove along that channel for two hours. It must have been 12 miles, anyhow. I think it was two hours and a half.

Q—How deep was the channel upon the average where you drove along its bed in the buggy, until you struck water?

A—The clear channel was about from three feet and a half to four feet deep on an average, I guess.

In making the drive, I kept in the channel all the time. The first water I came to was clear and running. I then followed right up the channel by the side of the water; there was room enough to drive except where it was too steep. I came to water on Section 33, Township 26 south, Range 22 east. I then drove up the channel along the water by the south end of Section 27, Township 27 south, Range 22 east. I ascertained where the water I saw came from. It came from the break in the canal of the Kern Valley Water Company. That break was between 19 and 20 miles below Headquarters, or the head of the canal. I drove four hours after I struck the running water before I found the water coming in from the west. It must have been about Sec. 4, Township 28 south, Range 22 east, and I went that distance along the water. It was about 3 miles. I traveled that far before I found any water outside of the bank. I drove in the channel right along side of the water. The average width of the channel where water was running in it was probably from 50 to 75 feet. It was under where I first struck the water. The water was running north. I found a channel south of where the water came in from the canal, but it was dry. I never followed the channel from Bonestell's house to the Adobe Holes. I have crossed it frequently and followed up the water. Where I have seen it or followed it, I judge it is from 50 to 75, or 45 to 75 feet wide and average depth from 3 to 3½ feet.

All of the water that is taken into the canal of the Kern Valley Water Company, at no matter which gate it runs out of at all, must back into Buena Vista Slough.

Water is at present running down Kern River into Buena Vista Slough, through the south channel. After reaching Buena Vista Slough, it divides, a portion running south and a portion running north. That running north, runs down Buena Vista Slough towards Tulare Lake.

There is no water running now in the main channel. It last ran in that channel in 1880, at the time of high water. The water is prevented from flowing into the main channel by a dam, into the main channel that throws the water into the south channel. I saw it there about April 1, 1881. The effect of taking the water out of the river by the canals above, has been to dry up the river, and the brush and trees have floated down and lodged on sand-bars, and willows are growing up along in the channel of Kern River.

A portion of Buena Vista Slough has filled up with sand and sediment since I first went there in 1876. This has been caused by the water running irregularly down Kern River. Not sufficient when it came to clear the channel of Buena Vista Slough. There was water running in Buena Vista Slough when I went there in the fall of 1876. Kern and Buena Vista lakes were full. In 1877, the water quit running in Buena Vista Slough in June. The water of Kern River discharged into Buena Vista Slough in 1877. Some little spurts of water came down. It might continue for a day or two, or 2 or 3 days; no length of time; no regular flow of water. It might have continued for a week.

In 1878, water just commenced to flow into Buena Vista Slough from Kern River, in February, and continued to flow until July. Then it ceased. It commenced to flow again about April 1, 1879. There was just one little spurt. The water just came down and ceased flowing. It flowed probably 2 or 3 days, and commenced to flow again about June 10, and continued until July and then ceased. I think it came down

again in December, 1879, and then ran for some time. There were interruptions. We then had water up to July 1880, when it ceased.

In 1881, it commenced in January or February and ran till March 10th. It ran a month or six weeks. It commenced again April 2, 1881. I was going up the river, and met the water just below the mouth of the Joice and Dixon ditch.

In 1876, Kern and Buena Vista Lakes were full.

In 1877, water flowed out of them through Buena Vista Slough.

In 1878–9, no water flowed out of the lakes. They were dry before any water went into them this year. The canal of the Kern Valley Water Company is 24 miles long from Headquarters. There is a difference of 37 feet elevation between the two points, Headquarters being the highest. After the water runs through the canal it goes back into Buena Vista Slough, which is ten feet lower than the end of the canal. I have run levels from the present end of the canal to the water line of Tulare Lake. The difference in elevation is 35½ feet. The difference in elevation between Tulare Lake and Headquarters is 72½ feet.

Q—What is the difference between the elevation of Buena Vista Lake and Tulare Lake?

A—I make it 82½ feet. Tulare Lake being the lower one.

Cross-Examination of S. W. Wible.

It was last Saturday, the 24th, that I was on Buena Vista Slough. First came to the slough at Bonestell's place. The water in the slough came into the buggy. It was running probably 1½ or two miles an hour—probably three and a half feet of water in the channel.

I followed the channel from there right up to Headquarters. It is a direct line 9 or 10 miles. It is 12 miles following the course of the channel from Bones-

tell's house to Headquarters, and last Saturday I followed it up that distance and found water all the way.

Q—How much water was running in that channel all that distance?

A—Well, it was three and a half feet where I crossed it, and that was the shallowest place that I know of.

The channel was not overflowing its banks, for all that distance, except at one place. The channel would hold a good deal more of water. There was one continuous channel the whole distance.

Q—I understand you to say that during this distance of 12 *miles, or for this distance of* 12 *miles, there was one continuous, connected channel?*

A—Yes, sir.

There was one place, about one and a half miles this side of Bonestell's, where there was a side channel and the water had got into it. The water came out of the main channel into that.

Bonestell's house is on Section 24, Township 29 south, Range 23 east. I drove up the twelve miles up the slough from Bonestell's house, right at the edge of the slough. The lowest places where the water had got out of the channel was on Section 25, and on Section 4 the water was running out into a channel that makes out of the channel at that point. That is three miles below Headquarters, if you go down one and a half miles; if you follow the course of the channel, 3 or 4 miles. This western channel, where it runs through Sections 4 and 9, is probably two feet deep; it is a well defined channel, as a general thing, all along the way from Section 4 down to Tulare Lake. It would probably carry two feet of water from Section 4 to Tulare Lake; I do not know of any place on that channel, between Section 4 and Tulare Lake, where two feet of water will get out of this channel. There might be places where it would spread out 100 or 200 feet, or even wider, but I don't think so. In the chan-

nel I followed from Bonestell's to Headquarters, there are places where it is probably 150 feet wide; such places must be on Section 5. On Section 4 the banks are high; the lowest or most sloping banks of that channel are on Section 5 or Section 4; at that point the channel is 100 feet wide and the banks raised up; it is a well defined channel that you can always trace it when you come to it, and it is dry; you would recognize it from the absence of tules and also by the depression; when you come to the outside it is bounded by tules; the tules are right on the bank. There may be a few holes in the channel, but, when you come to compare the two, there are no tules in it to what there are out of it; whenever I found the channel I found no tules in it.

When I went to the slough below Dover's I first struck it at Section 20, Township 27 south, Range 22 east, and at Mr. Crocker's hog camp. From there I examined the channel to the Adobe Holes. The channel along there is 100 or 150 feet wide. I can't tell how deep. I should judge from all the appearances that the water was 5 or 6 feet deep. The water running then, running north. The water was not to the tops of the banks. I saw a high-water mark on the bank above the water. The banks are sloping 1 to 2, or $2\frac{1}{2}$ to 1, and the channel 150 feet from there. I followed it from there to the Adobe Holes. At the Adobe Holes the channel was 200 or 250 feet wide. It was plainly marked. I think there was ten feet of water there running. I then went down and struck the slough again on Section 32, Township 26 south, Range 22 east. I found the west channel there dry. I think right there it was 100 feet wide and probably 4 or 5 feet deep. The banks slope at a regular slope. No tules in the bed of the channel. I went from there to Section 13, Township 26 south, Range 21 east. Then I drove through the west channel. I think the channel

was about ten feet deep. It was dry, and 100 or 125 feet wide, with sloping banks, and no tules in it. That point was on the south end of Section 13. I then went on to the north bank of the main channel, across this branch channel on Section 13, and followed right on the main channel down through Section 12. That is the main channel through Sections 12, 1 and 36. I found water along there, in 12 and 1, standing still. The channel through 12 and 1 was deep, within the banks 4 or 5 feet. The main clear channel with no tules growing in it was 100 or 125 feet wide. The banks were sloping. I found the same kind of a channel in Section 36, about ten feet deep, from 6 to 10 feet. I then went from 36 across 31 and 32, and struck the east channel. I crossed 32, where the two channels come together. It was dry, and 100 or 150 feet wide, and 3 or 4 feet deep, clear banks. From there I went right to the Tule House. At the Tule House I found a deep place and water standing there. I could not tell how deep the channel was there. Probably 20 feet of water and all.

The channel that ran across from Sections 1 to 32, where I crossed it, was 2 or 3 feet deep and 75 feet wide. I then went up the bank of the slough and went into the slough, right into the channel. I drove right up the bed of that channel, going south. That is the place I spoke of driving two hours and a half in the bed of the channel. It took two hours to drive to Salt Slough. I should judge it was about 12 miles in the channel. It was dry all the way—no water. It is between 3 and 4 feet deep and from 75 to 100 feet wide. It is a well defined channel. I went right up the channel and found no branches. The channel had sloping banks through that section. There is a well defined channel all the way up to Salt Slough, and of the same dimensions as I gave in Section 5. From Salt Slough down three and a half feet of water would run through

there without overflowing anywhere. After I got to Salt Slough I followed right up the channel—eastern channel. I met the water running somewhere about Section 4 or 33; I think Township 26 south, Range 22 east. At the place I met the water it was a little smaller—about 40 or 50 feet wide, and, I judge, about 3 feet deep. I followed that water up and went clear up to the break, and found water all the way.

I have crossed the swamp land across Sections 7, 8, 9 and 10, in Township 29 south, Range 23 east, and found a channel there, a well defined channel. The channel was 25 or 30 or 40 feet wide; I can't say exactly. It was pretty deep; three or four feet deep. I have been on Sections 25 and 35, or a little lower down. I found a channel in there. Along below the Fish Pond, in Section 27, I had to dig the bank down to make a road for the teams to cross. It was a deep channel—4 or 5 feet deep. I selected the shallowest or best place to construct a wagon road across it. Where I constructed the road it was 100 feet wide, and the banks were almost perpendicular. I think it must have been on the corner between Sections 19 and 25, and along across 13 and 11 diagonally. There is a channel along there. I have crossed the swamp land from Section 16, Township 28 south, Range 22 east, through Sections 10 and 3. I found a channel there. I cannot say how many, or whether there was more than one. I was going to build a wagon road through there, and I found it was deep and steep, and that I would have to fill up the channel almost, so that the teams could cross it.

I think the channel was 4 or 5 feet deep, and probably not more than 40 or 50 feet wide. Perpendicular banks, I think. I have been through the west half of Section 10, the west half of Section 15, and have been on Section 3, and may have been on Section 22, Township 27 south, Range 22 east. There was a channel

through there, running north and south. It is marked on this map 3. The channel was full of water. I am speaking of last Sunday. It was full of water when I drove to it. Wherever I drove to it on Sections 15 and 22 there was a well defined channel, and on Section 10 I think I drove right on the bank of the channel. It was a well defined channel, pretty full of water, banks both steep and sloping, and the channel probably two and a half feet deep and 40 feet wide. The channel was the same on Section 15 as on Section 10. On Section 22 it was about the same where I drove to it. The water was overflowing the banks at quite a number of places on Sections 10 and 15, and was outside of the slough six or 8 inches deep and two and a half, three or four feet the shallowest place in the channel. Don't think it was less than two feet deep at any place in the channel; might not be more than one and a half feet. There is a channel running through Section 33, Township 26 south, Range 22 east, from the north end to the south end. It was on Section 33 or Section 4 where I met the water running. I was driving in the channel up to the time I met it. In 33 the channel was well defined, 75 feet wide and 3 or 4 feet deep. The channel is clear. I saw no overflow there. I found a channel through Section 31. I came on to it at the southwest corner of Section 31. It was about 35 feet wide and 4 or 5 feet deep. Just drove to the channel and a little ways and back to the road. As far as I saw the channel on this section it was a well defined channel, with steep banks. The distance between my headquarters and Tulare Lake, in a straight line, is about 42 or 43 miles. It would be almost an impossibility to tell how far it would be along the course of the channel. Some places it would be double the distance; some less. The difference in elevation between my headquarters and Tulare Lake is about 72½ feet; that is to the water line. It may be 10

or 20 feet to the water at present. There are places in Kern River where it will be 700 or 1000 feet wide in extreme high water. The river overflows its banks during high water at points between Kern River Bridge and Buena Vista Slough, all along on Section 33 and on Section 2.

I think 50 cubic feet of water running by the Pioneer Bridge would reach Headquarters in 24 hours. If no water was in the river at all, the head of water running in the Calloway Canal would reach Headquarters.

Q—You have testified that you saw the water running in the Calloway Canal on the 13th day of March, 1881. Would the water which was then running into the Calloway Canal, if turned into the river at the canal, have gone through and reached Headquarters, on Buena Vista Slough, had the river been dry and no other water in it?

A—Yes, sir; it might if it was let alone—if it had full flow.

At that time about one-fifth of the water running in the river ran past the wing dam at the head of the Calloway, and down the river.

F. M. Epperly

Testified: I reside on Buena Vista Slough. I came to the slough in May, 1871. Then came to a point about 15 miles below Wible's Headquarters, to the camp now known as Dover's Hog Camp. I remained there until May, 1876. I lived there all that time, raising hogs. I was running them on the tule lands, on Buena Vista Slough, between the lower end of Weed Island and—well, down for nine miles north from Weed Island. The lower end of Weed Island is about 2 miles below the Bonestell House. The Button Willow Tree is about opposite the lower end of Weed Island. I was working my hogs from that point down about 8 miles.

When I went there in 1871, the slough was full of water, and ran, I think, until August; then it stopped running where I was. In 1872, it ran the whole year. Still running in 1873. In 1874 the water, if I remember right, stopped running a short time where I was. In 1875, there was plenty of water running there. I left in May, 1876. While I was at Dover's Camp, between 1871 and 1876, I was crossing the slough between the points mentioned. Crossed them often. I could not enumerate how often. I was working all the time in those tules there, looking after my hogs, and the number of times I crossed I could not tell you. I was working along that swamp land between those two points, and working over nine miles, all of it. I left there in 1876.

I returned back to the swamp the 1st day of August, 1877, and went to work with Mr. Crocker, tending stock pumps. My camp was on the slough, about three miles above Dover's place. I remained there about four months. Miller, Lux and Crocker had, if I remember right, twelve pumps running. The slough was dry when I came there, and remained dry as long as I stayed there. I was there four months, and during that time was traveling through the swamp land more or less, from Weed Island to six miles below the Dover Camp, about nine miles of country.

I came back again in 1878, late in the fall, and located on the swamp near the Tule House. The Tule House was nearly north of where I was located. I was on the west channel. I am six miles from the Tule House. I am right on the west side of it, eight miles from the Adobe Holes, northwest. I was raising hogs there, and remained until the last days of April, 1880. When I went there in October or November, 1878, there was no running water in the slough. The water did not come down there from the time I went there until I left. I was working my hogs from the Adobe

Holes down to the Tule House, on both sides of the swamp, and all through in different directions.

Most every day I was riding across those lands. I spent all my time in looking after my hogs in that swamp, all the time in the slough there. I went back to the Dover Camp in April, 1880. I was still raising hogs. I have remained there ever since, and been working there ever since. I have ranged my hogs from the lower end of Weed Island, down about nine miles. I have been on Buena Vista Slough, between Weed Island and Buena Vista Lake. Suppose I have been there fifty times, maybe more. I was along the slough there in 1872, hunting elk. I was on the slough at different points, traveling up and down it, nearly the whole length of it, between those points. There was a good head of water in there at the time. It was confined to the channel in most places, running out in a few places. It must have been in June or July, 1872.

Q—What was the condition of the slough at that time between Tracy's Crossing and the Bonestell House?

A—Well, there was a channel, a perfect channel, from the Bonestell House, below the Bonestell House, up to where you come to what is known as the drift, and there the water spread out some from the formation of this drift; made two or three different channels, and they all came back into the same one, with the exception of one that made out on the west side—that followed down on the west side of the swamp.

Q—What was the condition of the channel above the drift?

A—There was a well defined channel from there on out.

Q—How wide was that channel at that time?

A—Well, that channel must have been—well, it was different widths; some places sixty to one hundred and twenty-five feet, may be one hundred and fifty.

Q—Do you know how deep the water was in that channel?

A—No, sir; I do not. The water was running in it, running north. I have never seen that channel when there was no water running in it.

Q—How deep was that channel?

A—Well, I think that that channel must be—I think it would average seven feet.

Q—What kind of banks has that channel down below as far as the Bonestell House?

A—The most of the way down to the Bonestell House it has got banks. There are a few places that I could not cross it well on account of the banks being straight up and down. I have crossed that channel when there was running water in it at the Bonestell House. I crossed it first at the Bonestell House in 1873, right up where the Bonestell House stands. There was water in it then. I rode across on horseback. It didn't quite run over my horse's back; was not quite deep enough to run over his back. I last crossed there, at that point, about a week or so ago. There was water running there then. It came up to my horse's side. I think the water must have been three feet and a half deep. The water was running at that time northward. I have also crossed that channel about a mile above the Bonestell House, south.

Q—Is there a crossing at that point?

A—We used to have a crossing there that we passed at. I first crossed it there in 1873, and it swam my horse. I have crossed it there a number of times since. I could not say the number. I have not crossed there recently. I have not crossed that channel at any other point above the Bonestell House except that until you get up above the head of Weed Island, but I have crossed it there.

Q—What kind of a crossing was there there?

A—Well, you cannot cross there in a high stage of

water, but in a low stage you can cross there. It is very boggy and bad crossing. I have crossed up where Mr. Norton's place is, Mr. Norton's ranch. I don't know what section that is on. When the water is low there is a pretty good crossing, but when the slough is anything like full a man cannot cross it without swimming. I have crossed it above there at the old Tracy Crossing. I don't remember crossing it between the two points.

Q—Has there been any change in that channel since you first knew it in 1873 to the present time?

A—Not that I can see, any more than the drift pile.

Q—What change has taken place at the drift pile?

A—The wood that has drifted in there has been burned out and hauled out there, and left the channel more bare than it was when I went there. It has a better channel to pass through than it did when I first went there.

Q—Where does the main channel run after it leaves where the wood pile was?

A—Well, it runs, I think, a little to the left of the drift pile, the main channel does—follows down. It runs through the island, going north.

Q—You spoke of the west channel that leaves the main channel and runs westerly. Where does that channel continue to?

A—That runs down on the west side of the swamp, and empties into—comes into the slough.

Q—How is the bed of that channel where it leaves the main channel?

A—It is just a flat bed. It is a great deal higher; the bottom of it is a great deal higher than the bottom of the main channel. It is just a flat trough where it leaves the main channel.

Q—How high does the water have to be in the main channel before it can escape into the western channel?

A—Well, I think there would have to be about three

feet of water in the main channel; something near that. At the point where that leaves the west channel it is a kind of a flat basin of a channel. I guess it must be a hundred feet wide—fifty or a hundred; I am not positive. That channel runs off west, near where the drift pile was.

Q—How far was the drift pile below the Dover House?

A—It was above the Dover House. It is about a mile and a half north of the Norton House.

Q—You say that is a shallow channel where it leaves there. What is the nature of that channel after it leaves the main channel?

A—Well, some places it remains a kind of wide basin; other places a well defined channel with banks to it. It continues on and it goes clear down into the main channel that runs into Tulare Lake. It joins the main channel, if I recollect right, not far from the fish-pond.

Q—How wide will that channel average, take it its entire length—I mean the channel that runs around to the west?

A—That is a hard question for me to answer, because I could not tell the width that it would average. Some places it is a well defined channel, and in other places the water spreads out, may be fifty or one hundred feet wide. I think that channel would carry about two feet and a half of water without overflowing its banks.

Q—If you should put two feet and a half of water in that channel, what would then be the widest place?

A—Well, put in two feet and a half, and there is places in it that would be one hundred yards wide. In other places it would come down to a narrow channel, where it would not be over thirty feet wide, may be forty feet.

Q—Have you ever seen the water running in that

channel from the point where it leaves the main slough to where it connects again with the main slough?

A—Yes, sir.

Q—Down at the fish hole?

A—Yes, sir.

Q—How often?

A—I saw the water coming down there in 1872, running water there in 1872, 1873 and 1874. There was running water there all the time. I was working at that time right along on that channel.

Q—What is the condition, Mr. Epperly, of the main channel that you have referred to, after it leaves the Bonestell House, down to the Button Willows?

A—Well, from the Bonestell House down to the Button Willows, just below the Bonestell House, a short distance, there is a small channel comes out to the left and breaks around. The main channel runs right down, pretty near north, through the tules, to Button Willows. You can trace the channel right along all the way through. I think that channel would average, between the Bonestell House and the Button Willows, about fifty feet wide, pretty near.

Q—And what depth?

A—Not over two feet and a half.

Q—You say that there is a channel puts out from that on the left, as you go down, below the Bonestell House?

A—Yes, sir.

Q—Where does that run to?

A—That runs down and connects—the water connects on to the same channel that goes down by the Button Willows. I think it is about a mile below Button Willows. There the two channels run together. That is about a mile below the Button Willows, where that channel connects with the main channel.

Q—Which is the higher bed—the main channel where that side channel leaves it, or the side channel?

A—The side channel is the higher bed; the main channel is the deeper. I think the water would have to be one foot and a half deep in the main channel before it would run out in the side channel, but I took no particular notice.

Q—What is the condition of this channel, taking it from the Button Willows down to a point due east from the Dover Camp?

A—Well, there is a very well defined channel most all the way; some places very deep and other places not so deep.

Q—How much water will run in that channel without its overflowing its banks?

A—Well, I think two feet and a half of water will run in it at any time and will overflow only in one place. There is one place it will overflow its banks. It would spread out about fifty yards wide at that point. I think if you put two feet and a half of water in that channel, the widest in it will be about fifty feet, may be a little more; I can't be positive on that.

Q—How often have you crossed that channel between those points, between the Button Willows and the point opposite, due east from Dover's.

A—Well, I could not enumerate the times that I have crossed it. I have crossed it, I don't suppose, less than a thousand times, as far as that is concerned.

Q—At how many different points?

A—At most every point it could be crossed at all. There is places there you can't cross it on account of the depth, and a number of them, too.

Q—What is the condition of that channel from the point opposite Dover's house, where you left it, down to the fish pond?

A—From opposite Dover's house there is one place down next to the fish pond that the water spreads out a little; the water spreads out there, and the channel is

not so well defined between Dover's house and the fish pond. The channel at that point is about two feet and a half deep when full of water; that channel, after it reaches the fish pond, still runs north.

Q--How many channels are there going north after you reach the fish pond?

A—If I remember right, there is two running north.

Q—Well, now, keeping the easterly one, what is the condition of the easterly channel from that point down to a point opposite the Adobe Holes?

A—A good portion of the way it is a well defined channel; some places along there the water spreads out and makes a wide———; covers a scope of may be one hundred feet; may be more or less; I couldn't say; because I don't know anything more than just from the boards I have up, passing over it and looking at it; I never measured it in those places; I think that that channel between those points will carry in most places two feet and a half, may be three feet of water.

Q—Have you ever seen water running in that channel from the Bonestell House down to the Adobe Holes?

A—Yes, sir; I have seen it running there a number of times; I could not tell exactly the number of times. Every year, that there is any water to amount to anything in the swamp, I have seen the channel full.

Q—What is the condition of that channel from a point opposite the Adobe Holes down to Salt Slough?

A—Opposite the Adobe Holes, a portion of that channel is well defined; there is one place in there, it is a kind of flat basin again, the same as I speak of above; I think the place where that basin is, must be a half or three-quarters of a mile there; it may be a little more, but I think about that.

Q—How much water will that place carry between the Adobe Holes and Salt Slough?

A—On this flat portion of the country, I don't suppose that the water would get over two feet and a half—that it would carry over two feet and a half, until it would spread out over a big portion of the country; it would spread out over a quarter of a mile wide, and then it would come down into the main channel again. Where the channel is better defined, it would carry a great deal more water.

By Mr. GARBER. Q—It would carry more where?

A—Further down the channel, below the place that I speak of where the water spreads out.

By Mr. HOUGHTON. Q—What is the condition of that channnel from Salt Slough down to what is known as the Tule House?

A—It is a well-defined channel all of the way. That channel must be—I think it would average five feet, if not six, and it is from a hundred to one hundred and fifty feet wide.

Q—Have you ever been in that channel?

A—I have. I have traveled that channel, right in the bed of that channel, from the Tule House to the mouth of Salt Slough; I don't remember of traveling any farther north or south in that channel; I have crossed in different places above that.

Q—What is the size of that channel for the first two miles south of Salt Slough?

A—Well, I think that that channel from the north of Salt Slough, for two miles there, will average, anyway, fifty feet in width, and I think the channel will average something near four feet in depth. I never have seen water running in that channel between Salt Slough and the Tule House; I don't remember of seeing water in it. At the time I came there that country was dry, and remained dry until I removed away from there; that is, when I removed to the lower end of the swamp there was no running water there, and it remained so until I

left there. There was still no running water when I left there.

Q—Now, Mr. Epperly, to go back to where we left this western channel. What is the size of that channel running from the fish pond down to the Adobe Holes?

A—Well, in places it is a well-defined channel, and other places it is not. There are places in it that the water spreads out maybe a hundred feet wide, maybe more.

Q—How much water will that channel carry?

A—Well, when it is a hundred feet wide, I think there will be about two feet and a half or three feet of water in it.

Q—Has there been any change at all in that channel since you first knew it, at any point?

A—Nothing more than down about four miles below the Dover Camp, where the canal broke, there has a mass of sediment filled the channel up there. I can't tell you when that took place. I was not here when it happened. It must have been in 1878, the winter of 1878. I think that filling process has taken place along the channel for about two miles or about two miles and a half.

Q—Have you been along where that sand or debris run in recently?

A—Yes, sir; I was along there a short time ago.

Q—Is there a channel cut through there, through where this debris and sand has run in—where this sediment has come in?

A—Yes, sir; there is a channel there, but it is not so well defined as before that sediment came in.

Q—How much water would that channel carry between the fish pond and the Adobe Holes?

A—Well, I could not tell you that; I could not tell you how much it could carry, because there is so much sediment turned in there, and it is in such a shape that I could not tell you much about it.

Q—How much before that sediment came in there?

A—Just about three feet of water; close up to it. The average width of that channel between those points would have been, I think, forty feet; thirty-five, anyhow. It might not have averaged quite so much, and may have been more.

Q—What is the condition of the channel from the Adobe Holes down to a point opposite Salt Slough—the west channel, west from Salt Slough?

A—A portion of the way there is a well-defined channel, and other parts of it there is a kind of flat channel. I think where it is flat it would be about a hundred feet in width. I think that channel will carry about two feet and a half of water in the widest place there; it would be deeper in other places.

Q—About two feet and a half of water in there in the shallow places? How much land will it overflow?

A—Well, right at those shallow places I think it will overflow one-quarter of the land that is laying up along there. It might be a hundred feet wide at those shallow places, or more; I could not tell you as to that; I couldn't give you no permanent answer on that, because I never saw any of those places measured.

Q—What did you say would be one hundred feet?

A—Those wide places in the swamp where the water spreads out.

THURSDAY, April 28, 1881.

Testimony of F. M. Epperly (Continued.)

By Mr. HOUGHTON. Q—What is the size of the west branch of Buena Vista Slough, from a point opposite Salt Slough, or due west from Salt Slough down to a point opposite the Tule House?

A—Well, as well as I recollect there is a well defined channel from a point about due west of the Salt Slough,

opposite, pretty near, nearly due west, or opposite the Tule House. All along in there, there is a well defined channel. I have been along that slough a number of times; I could not tell you the number.

Q—Have you been all along it between those points, between a point west of Salt Slough and a point west of the Tule House?

A—Yes, sir; I have passed all along there, across it in different places.

Q—Well, then about how wide will it average?

A—Well, I should think it would average nearly one hundred feet.

Q—How deep?

A—On an average, I think it would be six feet deep. Some places it is a great deal deeper than others.

Q—Is there a slough running from the west slough to the east, at or near the Tule House?

A—About three or four miles, if I recollect right, maybe five, above the Tule House, there is a slough runs out of the west channel, and makes across into the east channel, that the water passes through when the water gets—I suppose when the water would get to be four or five feet deep, may be not so deep, in the west channel. It will pass through from that channel into the east channel.

Q—How wide is that connecting slough, that you spoke of there?

A—Well, that is a flat slough; it must be one hundred or one hundred and fifty feet wide, may be two hundred feet wide. It is a wide flat slough. That slough would carry without overflowing its banks, I think it would carry four feet of water.

Q—I ask you Mr. Epperly, to look at this map, Map 3. Here is the Tule House, and there is a slough on the map, running across, just above it. Is that the slough you refer to?

A—Yes, sir.

Q—Is that about the localily of it?

A—That is about the locality of it, somewhere near there. I think it intersects this slough at least three miles above the Tule House. I may be mistaken.

Q—Is not there a slough that comes right out at the Tule House?

A—Yes, sir; there is a branch of this slough runs off, comes in across there, and connects at the Tule House; that is a branch of this same slough.

Q—Then this slough that you have been testifying about is the slough that runs across above the Tule House?

A—Yes, sir.

Q—What kind of a slough is that that runs across from the west, that you speak of, from the west slough to the east, and connects at the Tule House?

A—Well, that is a shallow slough; it is not very deep. I couldn't say correctly as to how deep the water would have to be in the western slough before it would run into that connecting slough, because I never saw the water running in the slough there.

Q—Do you know which bed is the higher of the two?

A—The main channel is the lowest; it is the lowest in the main slough. The bed of this side channel is higher than the bed of the main slough; there has to be some water in the main slough before it will run out, but how much I don't know.

Q—How long during the high water in the spring, when the snows are melting, does the water, running down through Buena Vista Slough, usually remain outside of the channels?

A—Well, it generally gets back into the channels the last of July, when there is a heavy head of water running down. If there is not a heavy head of water running down, it will come back into the channels

sooner. It depends altogether upon the amount of water that is coming down the river.

Q—Well, how did the water, during the years you were there—1872, 1873, 1874 and 1875—continue to remain after it had gone back into the channels?

A—Well, in those shallow places in the channels, the water would be spread out. Where the channel was well defined, most all of the water would run in the main channel.

Q—Well, during those years, for what portion of the year would the water continue to run on through those channels toward the lake—during the years 1872, 1873, 1874 and 1875?

A—As far down as I was, it was running all the time; that is, from Dover's Camp to the lower end of Weed Island. It was running the whole year round, as well as I recollect; I may be a little mistaken on that, but I think not.

Q—When the water recedes and is confined to the channel, after the spring freshets are over, what portion of the swamp land, along the slough there, can be traveled over by man and beast?

A—I think about four-fifths of it can be traveled over.

Q—When the water recedes so that it is confined to these main channels, what effect has it upon those side or high channels?

A—Well, these side channels, the water stops flowing into them and runs back into the main channel and flows down the main channel.

Q—What change, if any, has taken place in the channels—the eastern and western channels of Buena Vista Slough—since 1871, when you first knew them; taking the whole channels all the way through?

A—Well, as far down as I am acquainted, I didn't perceive any particular change in them, any more than that drift that was in the main channel, just below Mr.

Norton's Camp, has been removed by fire, and by people carrying the wood away.

By Mr. HOUGHTON. Q—Are the waters running now in the same place they were when you first knew them?

A—Yes, sir. I don't see any change in them, only in one place; there is one place below Mr. Dover's Camp, where there is a break in the canal, that has filled with slush, and fill up this main channel in a measure.

Q—When you were on the slough from 1871 to 1876, at Dover's Camp, did you have a boat there?

A—Yes, sir, I did, and I used it; I used it for running around, getting out around in the tules, crossing the west channel there and getting on to some islands that lie right in front of the cabin. I have been up the slough, I guess, as much as a mile, or may be a mile and a half; and I have been down it about that distance, but not any further in the boat.

I saw the drift pile about one and a half miles below Norton's. It was just a mass of timber, etc. There must have been logs from one and a half to three feet through—some willows, some pine and some mountain cedar. I think some logs were 30 or 40 feet long—maybe 50.

I was last on Buena Vista Slough, below the break in the canal, a couple of weeks ago. I followed the main channel down on the west side, three miles below the Adobe Holes, and found running water as far as I went.

I was last on the channel, from Wible's Headquarters down to Bonestell's, last Saturday. I followed it from the Bonestell House up to Norton's Camp.

Q—What is the condition of that channel between those two points?

A—Well, if I remember right, I didn't see but two

or three places that was flowing over the banks any. There was some low places making out, that the water was breaking out into; one place very close to the drift where the water was running out. It was running out in that flat channel on the west side, in the western channel. I crossed the water there running into the western channel; I don't suppose there was over ten inches in depth of water running out there, may be more. When I crossed there in the main channel I think there must have been about four feet, or very nearly it; I should judge just from the appearance from the bank I crossed the channel at the Bonestell House. At the Bonestell House there must have been four feet of water in the channel. I didn't follow the channel below the Bonestell House that day. A little over a week ago I was on that channel below the Bonestell House.

Q—Did you at that time follow that channel at all below the Bonestell House?

A—Yes, sir; I was down on the channel to the clump of willows, the Button Willows there. The water was running below the Bonestell House at the time I was there, I should think a mile. I didn't go right to the end of the running water, but I was riding across it just above the end of it a little ways; I was at a point where I could see the end of the running water, it was passing along down the channel. I passed down the channel a little ways, and then rode back across it. At that time I followed the channel from the Bonestell House up to Headquarters. The water at that time was all confined to the channel; it was not overflowing the banks, no where.

I have been on the channel all the way from Weed Island to Wible's Camp. It is the same channel all the way, and no change since I first saw it to the present time, except at the drift pile.

Norton is on the south line of Section 10; and from

there it is about two and a half miles to Weed Island, and one and half miles to the drift pile. I have been on the margin of the slough all the way from Bonestell's house to Norton's, and as far up as Wible's.

Q—Did you ever see the water rise when the floods would come down; see the rise and how the water rose in that swamp land district?

A—Yes, sir.

Q—Will the water connect all through there—through the various channels that you have spoken of—in the channels? Will it make connection before it will flood the surrounding low lands?

A—Well, it will flood a portion of it where those shallow places in the slough are; it will flow out over a portion of that land and then come back again and pass into the channel.

Q—Will it flood it before it makes connection in the channels?

A—In those low places?

Q—Yes, sir.

A—It will run out in those low places different widths before it connects in the channels.

Q—Do you know any place at all, Mr. Epperly, from Wible's Camp to the Tule House, where you can cross that swamp land district without striking any channel at all?

A—No, I don't, without striking any channel at all; I know places where I can cross where the channel is small.

Q—I don't mean crossing in a straight line. I mean, don't you know, that there are places there that you can cross by riding around the hole, the depression, without striking any channel at all, from the east to the west, or from the west to the east?

A—No, sir; I don't.

Q—You do not; well, what would you always find in

the shallowest part of the channels that you speak of now?

A—Well, I would find a body of water running down through the swamp; if there was no water in the shallowest places that I know of in there, I would find a depression in the land, where it would possibly take two feet and a half of water to throw it out again, and spread it outside over the ground; I think it would carry at least two feet and a half of water.

I was on the west channel below Dover's house last March. I think there was water running there then. I suppose it came from Kern River. I don't know of any other source for it to come from.

The foregoing was the testimony offered in chief by plaintiffs to sustain the allegations of the complaint wherein they alleged that there was a continuous water course, known as Buena Vista Slough, from Buena Vista Lake to Tulare Lake, and that the lands of the plaintiffs border along and upon such water course.

The only evidence offered by the defendants in this case tending to break the continuity of Buena Vista Slough, from Buena Vista Lake to Tulare Lake, other than the testimony of the witnesses Souther, Stoner and Ellis, which has been heretofore given in this brief, in connection with the last point made herein, was, first, the testimony of the surveyors or engineers who ran a level line across the swamp land district, and through Sections 7, 8, 9 and 10, in Township 29 south, Range 23 east, and that of certain persons who at different times after the trial of this action was commenced, and while the trial was proceeding in the lower Court, made certain trips along the swamp land bordering on the slough, and across the same at some half dozen different points, commencing on the south, at a point running across Sections 7, 8, 9 and 10, in Township 29 south, 23 east,

and extending north, to some point in Township 25 south, Range 22 east.

The first trip made by these witnesses was that made on the 14th and 15th of April 1881, by M. F. Taylor, Vining Barker, E. D. Cross and H. A. Jastro.

The witness, *M. F. Taylor*, testified to the crossings made on this first trip:

I was first down on the swamp land represented on plaintiffs' maps 2 and 3, on the 14th of April, 1881. We started early that morning, and went down by Wible's Headquarters, followed the canal down over 20 miles, I think, as far as Crocker's Hog Camp. From Crocker's Hog Camp, we went in a northerly direction and crossed the swamp.

[This was the first crossing made by these witnesses.]

The water in front of Crocker's Hog Camp, appeared to be deep, and I attempted to drive around it, but after going I suppose half a mile, I didn't know how much further it would go, and I concluded to go back and get Mr. Estee, whom I had left at the house to go with us and show us the way across the swamp, as I was not familiar with the country then. We got Mr. Estee to go with us. By bearing further to the north, we went around the water. The water was spread out on the west side of a water hole or slough, out on the level land. The water was not over three inches deep.

Q—In crossing it did you find any channel at all?

A—No, sir; it was as flat as this floor.

After crossing it, we went eastward across the swamp. We did not cross any other holes, but drove around them. Mr. Estee was able to go around these holes easily. He tried to describe the route to me before he started with me. He said we would have no difficulty in going through there; he described the route, but I could not understand exactly where the objective point was.

I did not know where the Round Corral was. When we went back, he just guided us through, without any trouble at all. He did not leave us; he went clear to the corral with us.

Q—Did you find any channel there?

A—Nothing except those little water holes that we drove aronnd without any trouble. We could always drive around them. There appeared to be no connection between those little holes. The water came out of the break in the canal which was about three or four miles south of this hog camp.

From the Round Corral we went to the Tule Shanty; I think seven or eight miles; there was a large excavation there; the water was, I suppose, 300 feet wide on top. It was stagnant water. After reaching the Tule House, we went south of the Tule House some distance, and then drove across the swamp in a southwesterly course, I should think due west—a little south of west.

[This was the second crossing made by these witnesses.]

The Tule House is on the southeast side of the body of water that I speak of.

Q—Was the water in a channel of any sort?

A—Yes, sir; there is a channel there. And in going south from the Tule House there is a depression in the land that I suppose is 100 feet wide. We crossed that depression and went west, or a little south of west, and drove across the swamp to the high land. Followed the edge of the swamp up and came to a slough—a dry slough at that point; followed up on the east bank for three miles, I suppose; sometimes there would be water in it and sometimes there would not be. After going three miles I came to what I thought was the end of it. We turned then and went towards the east towards the Round Corral.

[This was the third crossing named by these witnesses.]

It was very gradual there. If there was any channel at all, it was so indistinct that I didn't think it worth while to follow it up any further. Then we crossed and went to the Round Corral. This slough which we found on the west margin of the channel seemed to be right on the west boundary of the swamp land. It was getting dark when I drove across to the Round Corral, but I did not perceive any channel at all in going to the Round Corral. We camped there that night. The next morning we continued along the margin of the swamp land on the west side to the southwesterly corner of the Cox & Clark fence, and then struck across to Dover's, crossing the swamp.

Q—Did you come to any channel there?

A—There was a little water hole there where we drove around. It was on the east side of the swamp. After driving around that we found nothing until we got to Dover's.

[This was the fourth crossing made by these witnesses.]

From the pond on the side, in crossing over to Dover's, we found nothing indicating water. We then crossed the swamp again to the east side from the point near Dover's.

[This was the fifth crossing made by these witnesses.]

Q—In crossing the swamp there to the high land did you find any water?

A—Just before we got to the high land there was a hole that we drove over. We drove near the north end; there was no water in it if I recollect right. That was the only depression that I noticed in the trip across that had any water in it, or that had any marks of a

channel. There was one place on that trip which we left to our right, and we did not change our course at all; we left it to our right, to the north; it seemed to be a depression there, but it had no water in it.

CROSS-EXAMINATION.

On cross-examinatton this witness testified: On this trip Mr. Jastro, Mr. Cross and Mr. Barker were with us.

H. A. JASTRO

Testified in relation to this trip: I was on Buena Vista swamp about three weeks ago, from Wible's Headquarters down towards Tulare Lake.

Q—From Wible's Headquarters where did you go? Can you, on these plaintiffs' maps 2 and 3, trace your course generally?

A—I think I could. We went down, I think it must have been 18 or 20 miles along that canal to Estee's Hog Camp. I could not tell the section, probably a mile, I think, from the Adobe Holes. There was water right there in the slough in front of his house, or was then.

[This was the first crossing.]

From Estee's Hog Camp we went in the swamp and across the swamp down to the Round Corral. We went north from Estee's Camp and then crossed the swamp.

Q—Did you find any channel in crossing that swamp?

A—No channels that I could see. I crossed the Round Corral, and we found holes containing water. We went around these holes crossing over to the corral. We went from the Round Corral to the Tule Shanty in a straight line on the margin of the swamp. We found no water, not the way we went, and crossed no channel. From the Tule Shanty we crossed the swamp,

probably 100 yards from the house, going in a southwesterly direction.

[This was the second crossing.]

Q—Did you find any channel through that country?

A—No, sir; to the north of the Tule Shanty there is water. North of the house there is some water.

Q—Did you find any indication of water at the Tule House?

A—No, sir.

Q—You found water, you say, there?

A—Yes, sir; in a big hole right there, near the Tule Shanty. From the Tule Shanty we went across the swamp land southwesterly, and struck the slough on the west side of the swamp. We drove southerly probably about three miles. I did not trace it further, because there was nothing more to trace. The water ran out. We then crossed the swamp back again to the east side and to the Round Corral.

[This was the third crossing.]

Q—Did you cross any channel at all?

A—No, sir. We went from Round Corral to Goose Lake, and went around to Cox & Clark's fence, and then crossed the swamp to Dover's house. We crossed from Cox & Clark's fence over to Dover's house.

[This was the fourth crossing.]

Q—In crossing over to Dover's house, did you find any channel at all?

A—Found water in holes; several holes there; the water was standing in holes. Those holes were not connected, because we drove around them.

Q—Did you drive around them without going into any channel at all?

A—No water; yes, sir. No depression in the ground from one hole to the other. We found no channel at

Dover's. We re-crossed the swamp from Dover's towards Broder Island.

[This was the fifth crossing.]

In crossing we found water. It was not running. It seemed to be standing in the slough. It was very muddy; a sort of a slough that we crossed; there is standing water. The water was not very deep; I suppose about knee-deep to a horse, and not exceeding 25 feet wide. I saw the end of the water northward, but not the end of it southward. We met no other water and saw no other channel or hole.

CROSS-EXAMINATION.

On cross-examination this witness said: It was three weeks ago that I was down on this body of swamp land on Buena Vista Slough. Murray Taylor, Vining Barker and Ed. Cross were with me.

Q—In making that trip you were from 6 o'clock in the morning to 2 o'clock the next morning?

A—Yes, sir. Mr. Estee went with us to the Round Corral to show us where we could get across the swamp lands without driving through the deep holes.

E. D. CROSS

Testified in relation to this trip: Some time between the 20th and the 14th of April Mr. Barker, Mr. Jastro, Captain Taylor and myself were on a trip across the Swamp Land District. From Wible's Headquarters we went down the west side until we got to Crocker's Hog Camp, and then went across to Round Corral.

[This was the first crossing.]

Q—You went to Crocker's Hog Camp. Did you cross directly from Crocker's Hog Camp; did you strike any water there?

A—Yes, sir, we found sloughs of water all the way

across, from place to place. There was no current of water there, no stream of water that we had to cross. There were ponds in there from place to place, and there was one place where the water was flowing where we made a crossing; a little stream of water running from one lake to the other, I suppose; I didn't pay any particular attention to it. That I should judge was about opposite to Crocker's Hog Camp.

From the Round Corral we went up on the east side as far as the Tule House. At the Tule House we found some water in the slough west of the Tule House; then we went up and crossed over to the west side.

[This was the second crossing.]

After crossing to the west side we saw water in the ponds along from place to place.

Q—Did you find any slough going along across to the west side from the Tule House?

A—Yes, sir, there is a part—there is quite a piece there. There is a deep slough or channel along there for five or six miles, I should judge. It runs north and south, I should judge, mainly. It does not run quite north and south. We followed up that slough, went around that slough, and crossed over to the Round Corral and camped. We staid over night at the Round Corral. The land along that slough was level; such as the principal portion of the swamp land through that country. In going across this trip, westward, from the Tule House, we found some ponds of water, and went around them, traveled around the ponds and went across to the opposite side of the swamp. We then recrossed the swamp to the Round Corral.

[This was the third crossing.]

Q—Did you find any channel on your route back to the Round Corral?

A—Well, I suppose this channel was about five miles in length, I should judge.

Q—Was it a continuous channel ?

A—For five miles.

Q—After the five miles was it?

A—No, sir, it spread out.

Q—Into a level country?

A—Yes, sir, I should call it so. From Round Corral we went next morning and followed the enclosure, I believe it is Miller & Lux's, or Cox & Clark's. We went up above a piece, and went on the west side to the Epperly Hog Camp. We were going in a westerly direction. I have no idea on the map where that would be.

[This was the fourth crossing.]

I mean Epperly's hog camp, now known as the Dover place, I believe.

Q—What did you see on that trip in the way of water?

A—There were little sloughs and ponds all of the way along. Now and then we would come to a pond and would go around it.

Q—Was there any connected channel through there, that you saw between those points?

A—No, sir; I don't think there was.

Q—Can you tell anything with reference to whether there were any signs or marks of channels, connecting those points that you crossed—did you cross any channel at all?

A—No, sir; I don't consider that there was any connecting channel at all. It was all swampy low land through there. In places we would find ponds of water. We went around them. We did not go through the water when we could avoid it.

After reaching Dover's, we came back again to the east side, to what is called Broder Island.

[This was the fifth crossing.]

Q—Did you find any channel between Dover's place and Broder's Island?

A—Not that I could call a channel, no.

Q—Do you mean by that?

A—There were large ponds of water through there; but we went around all of the ponds.

Q—Were there any connecting channels between those ponds; did you cross any defined channel?

A—No, sir; nothing that I could call a defined channel.

Q—I mean where the water runs when it is up. Was the water over the swamp then, or was it dry?

A—Where we were it was dry, excepting the holes.

Q—Was there any defined channel between those holes?

A—I didn't consider there was, no, sir; not at low stages of water.

VINING BARKER

Testified in relation to these trips: I have been on the body of the swamp land, north of Wible's Camp and south of Tulare Lake. I was there in 1872, but I never crossed it until last month, April. I went from Wible's Camp down the slough, on the west side, to Dover's Camp. There was water about five miles below Dover's Camp. The ditch was broken, and it was running into the swamp. We continued on down to the edge of the ditch, about Crocker's Camp. We crossed from there to what is called the Round Corral.

[This was the first crossing.]

In making that crossing, we struck some water on the west side of the swamp. I think we crossed water in three different places; it appeared to be going down the swamp toward Tulare Lake; the same water, I should judge, that came out of the ditch or break.

Q—Was it confined, or in a channel?

A—No, sir. I could not say it was.

Q—Did you see any channel from there at all?

A—We struck depressions in places, and some places we struck where there were channels.

Q—Continuous channels?

A—I could not say that they were.

Q—In going across there would you say that there was a channel through that body of swamp land—a continous channel?

A—No, sir. I would not. We struck a channel in some places, and in some places we followed them where they would run north, and there would be a little deprestion, but I could not say that there was a channel. After reaching the Round Corral we went up on the east side of the swamp to the Tule House.

Q—Did you find any channel there?

A—There was a channel there in front of the Tule House, with water in it. I don't think it was running.

From the Tule House we went up the channel about probably a quarter of a mile, and we crossed to the west side of the swamp.

[This was the second crossing.]

I did not follow the slough to the end of it; just crossed over it. We struck a channel on the west side. We followed that down about, I should judge, two or three miles; two miles. It seemed to run out. We crossed over to the high land. After going to the high land, we re-crossed back to the east side, struck on the east side, probably two or three miles above the Round Corral.

[This was the third crossing.]

Q—Did you find any channel north and south, going back to the Corral?

A—We did strike one or two places that we drove around in the middle of the swamp.

Q—It appeared to have no continuous channel?

A—No, sir. We stayed all night at the Round Corral. The next day we went to the corner of Miller & Lux's fence, and crossed to the west again, and came out at the Dover House.

[This was the fourth crossing.]

Q—Did you find any channel in going through there?

A—There was a slough. We crossed that channel on the west side, as we went through, with a little water in it; no running water.

Q—How large a slough was that?

A—Well, where we crossed it it was quite a large slough; that is, it was deep, but——

Q—(Interrupting.) Did you see the end of that?

A—We did not follow that there, when we crossed it, to the end. We then re-crossed toward Broder Island.

[This was the fifth crossing.]

We did not cross the same slough—not on the west side.

Q—From Dover's Camp to Broder Island, did you find any channel?

A—We did cross some water on the west side of the slough, or rather the north.

Q—Was that water in the channel.

A—I don't know whether it was in the channel. It was in a hole. It was not running.

Q—From wandering around through the swamp land, did you find throughout the whole length of it, did you find any continuous channel running from south to north, or north to south?

A—No, sir.

Q—Or in any direction?
A—I don't think there was.

CROSS-EXAMINATION.

On cross-examination the witness testified: I made a trip about the 13th or 14th of April. Mr. Jastro, Mr. Cross and Mr. Taylor were with me. Ed Cross went with me, and Jastro and Taylor were together the most of the time. I am not in the employment of Mr. Haggin, but I was three or four years ago. I have been in the employment of the defendant recently. I had a contract with that company last winter, which I got through with a month ago; not an extensive contract. I was there five or six months. I have been in the employment of Mr. Haggin before.

The second trip made by these witnesses, and about which they testified on the trial, was made April 21st, 22d and 23d, 1881, by M. F. Taylor, J. D. Schuyler, Walter James and J. G. Jackson. This second trip was made, as testified to by the witness James, to determine whetver there was any water course running through it. He says:

We went there to hunt for channels; went for the purpose of finding out whatever channels might be found, and whether there were or were not channels, for the purpose of testifying in this suit. First struck the body of swamp and overflowed land near Goose Lake, on Section 29, T. 27 S., R. 23 E., and followed through Sections 20 and 19 in that Township, and through Sections 13, 14, 10 and 3, T. 27 S., R. 22 E., and through Sections 33, 28, 27, 22, 15, 10 and 3, T. 26 S., R. 22 E., and along the margin of the swamp and overflowed land, and from there north to the Tule House, which is on Section 32, on T. 25 S., R. 22 E.

At the Tule House there was a slough 100 feet wide, from 10 to 12 feet deep. We traveled north on that slough through Sections 29 and 20; it terminated on Section 20, T. 25 S., R. 22 E. We could not trace it any further.

[First crossing.]

They then made the first crossing of this swamp and overflowed land, through Section 19, T. 25 S., R. 22 E., and Section 24, T. 25 S., R. 21 E., to some point on high land, about Section 23 or 26.

From the point I left on Section 20 to the high land, Section 23, I found no channel, no indication of a channel. From there we traveled north eight miles; found no channel going northward.

From there we went east to about Section 2. T. 25 S., R. 21 E. Found a large slough with some standing water in it. The channel was 100 feet wide, and 8 or 10 feet deep. We followed that channel northward a mile or such a matter, to its end. We then followed it back to Section 2, and followed up the slough, on the east side of it, from Section 2 to Sections 12 and 13, about a mile and a half or two miles from a point on Section 2 to where the slough disappeared at the southern end.

We then drove in the direction of the Tule House until we came to the bank of the slough on or about the north line of Section 29, T. 25 S., R. 22 E., and followed up the west side of the slough to the Tule House.

Q—Did you trace that slough any further north of the Tule House?

A—No further north of the Tule House.

[At this point the witness made the second crossing of the swamp land.]

At this point we followed up the slough that is at the Tule House in a southwest direction, and on the east side, a mile, more or less. The slough was well defined and easily traced. We traveled in the bed of the slough a mile and a half, and when we found we were near the western margin of the swamp and overflowed land, we were going in a southwesterly direction, and the distance would bring us on or about Section 21, T. 26 S., R. 21 E.

Q—Do you mean the general direction that was laid down on this map as the connecting channel between the east and west sloughs there, from Section 32 to Section 1?

A—I should judge that this map represented the course, very nearly, of that particular part. My recollection is that it is more crooked than it is represented on the map. Soon after leaving the Tule House we crossed the mouth of the slough coming in from the west.

Q—Did you trace it up at all?

A—No, sir, I did not trace it up at all. On Section 1 I found a depression, or the commencement of a slough running to the north. The slough from the Tule House to Section 1 was of various depths. The greatest depth was at the Tule House, there it was 10 or 12 feet, and the lowest depth I should think was 2 feet. In some places it had no defined width, in some places 50, 60 or 100 feet.

By no defined width I mean the sloping banks being so gradual, it was impossible to say where they ended. We found water in a channel at the Tule House, standing; and in a channel from the Tule House to Section 1 in two or three places.

After reaching this slough on Section 1 we followed southward along the slough I should say half a mile to about Section 12, T. 26 S, R. 21 E; there the channel disappeared. From there we traveled along the mar-

gin of the swamp and overflowed land two or three miles; saw no signs of a channel, to about Section 31, T. 26 S, R. 22 E.

[From there the third crossing of the swamp and overflowed land was made.]

We crossed to the high land on the east side at a point on Section 33, T. 26 S., R. 22 E. We found no channel at all, nothing to indicate a channel; tule land from one side to the other. Near the west side we found some ponds, standing water; I should two or three hundred feet across.

[The witness points them out on the map as in the neighborhood of Section 31, T. 26 S., R. 22 E.]

From Section 33 went to the corral near the centre of Section 3, T. 27 S, R. 22 E, along the margin of the swamp and overflowed land between those points, and from there traveled south through Section 10, 15, 22,27 and 34, T. 27 S, R. 22 E. Did not see any channels or slough along that course, or indications of a channel. From Section 34, I traveled through Section 10, T. 28 S, R. 22 E, and through Section 3 to some place near the western portion of Section 10, and found no channel. At that point we found water, and could travel no further; the water was spread out over the country, following no defined course, but spread out generally. We stayed all night at that point.

[At this point the fourth crossing of the swamp and overflowed land was made.]

We went by my instrument. We crossed over in the water in a southwesterly direction, through Section 9 and a portion of Section 10, T. 28 S., R. 22 E. I found no channel in crossing through there. Crossed over completely to the western boundary of the swamp land. I found no channel through there; water all of

the way, some places moving, some places still. We then re-crossed to our camp on Section 10.

From there we travelled a little north and east to some point on Section 2, T. 28 S., R. 22 E., on the east margin of the swamp.

We found no channel through there. There was some water there. And from Section 2, we travelled through Section 2, T. 28 S., R. 22 E., in a southwesterly direction, through Sections 11 and 13, T. 28 S., R. 22 E. We found there a flat tule country, no channel, no water.

We then followed up between sections 19 and 24, which brought us to the corner of Sections 24 and 25, T. 28 S., R. 22 E., passed no channels or depressions up to that point.

[From this point the fifth crossing was made, diagonally through Sections 25 and 35.]

Going through there we found no indications of a channel.

From that point, we travelled along the road that runs by the Dover House along the margin of the swamp and overflowed land to a point about the centre of Section 12, T. 29 S., R. 22 E.

[From this point the sixth crossing was made]

From Section 12, we travelled east, through Sections 7. 8, 9 and 10, T. 29 S., R. 23 E. We went due east.

Q—Did you find any channel there in that course?

A—No, sir.

Q—No indication of a channel?

A—No sir. With the exception of some grass, alkali islands, it was one level unbroken country, flat, and covered with tules. We went directly across the swamp land in that course, and came out on high land on Section 11. Saw no indication of a channel, but saw some water at some place on Section 8. We did

not cross it. We selected this last point for making a crossing, because we had a map of that portion of the country which showed no channel in that portion of the swamp and overflowed land. It was a copy of map D.

CROSS-EXAMINATION.

On cross-examination the witness testified: On this trip, taken between April 22d aud 24th, we crossed the swamp land from east to west and from west to east, at four different places. At one place we re-crossed, but crossed at four different points.

From the Tule House we traveled down the slough by the Tule House about a mile and a half, where the slough run out, and from there went west to the western margin of the swamp land. Then we went northward seven or eight miles ; made an examination west to some place about Section 2; that would bring us to about what is marked on map as Mud Slough, in T. 25 S., R. 21 E. I followed that slough up a mile or a mile and a half, more or less; found the head of it; could not trace it any further.

After going around Mud Slough we went no further east than section 8; we did not cross over what is represented on this map as Buena Vista Slough; did not go east as far as that.

From the Tule House we traveled up the slough, which was there at the Tule House, until we came to this cross slough, and followed that through until we came to the channel on the other side.

Soon after leaving the Tule House we saw another slough coming in from the west; that is, I think, correctly represented on this map.

After reaching this slough on the west, we traveled south along it for a mile, about. We then continued along the west side three or four miles, down to about Section 30, T. 26 S., R. 22 E.; then went across the

slough, traveling a little south of east. We had an instrument by which we fixed the course. We started from about the southwest portion of Section 30 and came out at some place in Section 33. I found no channel going across that strip.

From Section 33 we followed the margin of the swamp land to Round Corral, which is in the centre of Section 3.

We then went along the margin of the swamp and overflowed land on the west side to the centre of Section 10, and from there went west across the body of swamp and overflowed land, through sections 9 and 8. Our course by the instrument was due west, but did not go in a straight line—went in a crooked line—as in some cases we came to ponds and islands which we could go around.

Q—To go back again, I understand, from the Tule House, you went off into the side slough which goes west. Where did you strike the slough which is represented on this Map 3, and on the east side again, if at all, after leaving the Tule House?

A—I don't know, sir.

Q—You did not strike it at all?

A—If we did, I didn't see it.

Q—You did not follow that slough at all from the time you left it on the branch slough, in Section 32, in a southerly direction?

A—No, sir.

Q—You know nothing about that?

A—I know nothing about that, no sir; except that when we passed over this point of land described we could not see it.

We made no crossing that would bring us out on that slough between the Tule House and Section 33, T. 26 S., R. 22 E. I was not on that slough at all between those points. In making this trip across from Section 10 to Section 8, the deepest water found was a

foot and a half. We came to some holes; I could not tell how deep they were. We did not cross them.

From this point we continued along the western margin of the swamp and overflowed land to the northeast corner of Section 25, Township 28, Range 23, and from there we went diagonally across Section 25, and came out on the seventh standard line.

Q—I understand you found no water there, making that trip?

A—I crossed no water.

Q—Do you say you found no water.

A—I didn't say I found no water.

Q—Then yon did find water?

A—I don't remember. We may have passed in sight of water, but we crossed no water.

Q—Did you go out of your course at all to avoid crossing water?

A—No, sir. We kept very nearly in a straight line all the way across. I don't know whether I saw water or not. I don't remember that we saw water on our right and left in crossing.

From there we continned down the Dover road, and made a crossing to the center line of Sections 7, 8, 9, and 10, going due east.

We saw some water in crossing there, but did not cross any. There were tules all the way across, 6 or 8 feet high.

Charles Jackson, Captain Taylor and Mr. Schuyler were with me on that trip.

Q—What was your purpose in going down there on this slough on the 22d, 23d and 24th of April, 1881?

A—To get information in regard to that country.

Q—To be used on this trial?

A—Yes, sir.

Q—And you had never been there but once before, and that was in 1871, had you?

A—I had been on the margin.

Q—You never had been through the swamp land but once, and that was in 1871?

A—No, sir.

Q—Was it to get information as a witness in this cause that you went down there?

A—Yes, sir. I am employed by Haggin & Carr, and have been in their employment, since 1874, pretty much all the time.

RE-DIRECT EXAMINATION.

On re-direct examination the witness testified: The ponds that I saw near Dover's were on about Section 7, T. 29 S., R. 23 E, I did not examine them. I did not see the extent of them; not exactly. My recollection is that one pond had some length east and west, half moon shape. We passed near enough to them so that I could see the water, and shape of them. That is all we cared to know about them. We were in a hurry to get through. I don't think we passed between these ponds. We did not go to the bank of the ponds at all; drove within two or three hundred feet of them; no nearer than that.

CHARLES G. JACKSON,

Who accompanied the witness James on this trip, and was in the same buggy with him in making it, testified in relation to such trip, as follows:

I have been on the body of swamp land between Wible's Headquarters and Tulare Lake during the past month; I was there about the 21st or 22d of last month.

Going to where the Tule House and Round Corral are, we started on the morning of the 21st from Lone Willows, went to Round Corral, and from there in a northerly direction to the Tule House; going from the Round Corral to the Tule House we saw

no slough or channel. At the Tule House we found a body of water 75, 80 or perhaps 100 feet wide, in the slough. We followed the slough up about half a mile northerly.

Q—Will you take these maps 2 and 3, and point out the course as near as you can?

A—If the Tule House is correctly located on Section 32, we went northerly half a mile on the east bank of the Tule House Slough; and crossed then to the west bank and followed it up still further, going northerly, the same slough, about a half a mile further until it ran out. Going this distance, we saw no branches of the slough coming in or out of it. From that point we went southwesterly right along to the west side of the swamp land; found no channel at all.

If map 3 is correct, we went across (pointing on the map) to a point about section 26, T. 25 S; R. 21 E [first crossing]. Then we went easterly a couple of miles, when we came to what appeared to bethe northerly end of the slough, and we followed up about a mile, I should judge, on the east side. From there we followed along in the road, northerly, six or eight miles, I should think. In going this six or eight miles we saw no channel or slough.

We then started easterly and struck the slough 50 or 60 feet wide, with standing water in it; followed it northerly to the end, a mile and a half, probably. There was no inlet to the slough, that I could see. I was hunting for it. The banks probably varied from six to eight feet deep, in places down to nothing, and it was forty to sixty feet wide.

From there we went in a southeasterly direction, until we came back to the slough we had headed off, just above the Tule House, where we met Captain Schuyler and Captain Taylor. We then struck what I call the Tule House Slough. We reached the Tule House, and

camped there that night. The next day came in a southerly direction, following down along the bank of the same slough, the Tule House Slough.

[Witness points out on Map 3, the course which he took.]

[Second crossing.]

We followed that Tule House Slough two or three miles from the Tule House. We drove right into it; towards the latter end drove in the bottom of it—the bed of it. We saw no branches running in or out of it. That brought us out about, I should judge, on Section 13, T. 26 S., R. 21 E. At that point we found a slough there, or various little veins or depressions there, running out over a pretty level piece of ground. We followed it southwesterly until it gave out. From there, we went along the swamp and overflowed land to another old house or corral, and from that point crossed the body of swamp land in a southeasterly direction. [Third crossing.] We took a course which was S., 78½° E. Going across there, I saw a couple of small ponds; there was no connection between them. That was all the water we saw. We saw no slough or channel through there. We struck the east side of the body of swamp land about a mile and a half, by the wheel of our wagon, northwesterly from the Round Corral.

From there we went along the west margin of the swamp land of Section 10, T. 22, Range 27, and camped that night; and the next morning I set an instrument, and watched Mr. James and Capt. Taylor wade across to the west side [fourth crossing]. From there we went along the margin of the swamp land, to the southeast corner of Section 24, T. 28 S., R. 22 E., and crossed the body of swamp land again, going southwesterly [fifth crossing]. Going through there, the country was covered with tules,

apparently level. We found water, as near as I could get at it, about the southwest corner of Sec. 25, or the northeast corner of Sec. 35. It was not running; it was a pond of water; we went around the south end of it; did not go around the north end. Other parties went around the north end. There was no slough running in or out of it, that I saw. That pond, I should judge, was all of the way from forty to sixty feet wide, and three or four hundred yards long. Before reaching this point I saw no channel or slough, and from this point we went to the corner of Section 34; saw no channel of any sort.

From there we continued along the road to Dover's, and at that point consulted a tracing of a map that Mr. McCray made—Map "D."

After leaving Dover's we went down to about the middle of Section 12, about the center, taking this map as our guide. Then we took a due easterly course, as nearly as we could keep it, and went across the body of the swamp land to the east side [sixth crossing]. We selected this point on Section 12 to cross because we saw there was no indication on the map that there was a well defined channel there. We went through Sections 7, 8, 9 and 10, T. 29 S., R. 23 E. On that trip I saw two ponds of water to the south of us; should judge they were on Section 9. One was pretty round, and would occupy an acre, I should think. The other was much more in the nature of a slough or arroya. There was no outlet to it that I saw. There was no connection between them at all. In going across there I crossed no channel or slough.

CROSS-EXAMINATION.

On cross-examination the witness testified: The slough that we found at the Tule House was from 75 to 80 or 100 feet wide at that point. We followed it northwardly for about a mile and a half, and then went

westerly across the swamp to a point on Section 26 or 35 [first crossing]. From there we followed down the slough a half or three-quarters of a mile, and turned and went north to the end of the slough; then went north from six to eight miles, and then went in an easterly direction, and struck the slough there. We followed that slough, going south, a couple of miles, and then went back to the Tule House and camped that night [second crossing]. The next morning we went in a southerly direction along the slough that is there; went on the east side of it, and kept it until we commenced bearing west. We then crossed to the west side, coming out on about Section 13. The slough was not continuous from the Tule House to Section 13, it gave out about half a mile before reaching Section 13. From there we went along the margin of the swamp land, possibly to Section 24 or 25, and then [third crossing] went across the body of swamp land there and came out about a mile and a half, according to the odometer, or measurement by the wheel, northwesterly from the Round Corral. That would bring it about Section 33, somewhere, T. 26 S., R. 22 E.

From there we went along the margin of the swamp land, and camped that night, and Mr. James crossed the swamp land the next morning [fourth crossing], over to Section 10, T. 28 S., R. 22 E. I did not go with him. We then continued in a southerly course to the southeast corner of Section 24, and crossed [fifth crossing] the body of swamp land, and came out at the southeast corner of Section 34.

We then followed along the road by Dover's to about the center of Section 12, and then went due east [sixth crossing], as near as we could by the instrument, across the swamp and overflowed land. I afterward went down to this last crossing with Mr. Fillebrown and Mr. Macmurdo, and they ran levels across about a quarter of a mile from where we had made the

crossing. I told those parties that I had made a trip across there before, and that they were going, in running their line, on pretty nearly the same line that I went on before.

When I made this trip with Fillebrown and Macmurdo, when we came to the pond I went to where I could see the north end of the slough running from it; I should judge it was four or five hundred yards. I did not go around the end. I satisfied myself that I could go around that way.

M. F. TAYLOR

Testified in relation to this trip. In making this trip on the 22d, 23d and 24th of April we went to the Tule House shanty, which is on Section 32, T. 25 S. R. 22 E. We found stagnant water there. After reaching the Tule House we traveled down the slough on the bank of which the Tule House stood. By "down" I mean north, toward Tulare Lake, about a mile. We went down about a quarter of a mile on the east side, and then crossed to the west bank. Where we crossed the water was about one foot deep, and it was about thirty feet wide. The banks were about two feet high. We followed the course of the slough to the edge of Section 20, T. 25 S., R. 22 E., where the slough had run out.

[First crossing.]

From there we crossed the swamp land to the west side, and then went north, along the margin into a point beyond the limit of Map 3, and then turned east and went to a slough with water in it. We found a slough there that was sixty or seventy feet wide, and two or three feet deep, with standing water in it. We followed that north about a mile, where we came to the end of it, to a lake bed. That would be about where the lake is designated on Map 3, and marked "Laguna"

near Section 2., T. 25 S., R. 21 E, I think that is the place. We continued up the slough, going south, for about two miles, to its end, where it disappeared entirely. We drove in the middle of the slough. We then crossed and struck the Tule House Slough, and then went to the Tule House and camped.

[Second crossing.]

The next day we traveled up the slough that the Tule House was on, a short distance south. The water runs the other way. I traveled over the slough from the Tule House I suppose three miles, into Section 13, to where it forms a junction with this slough which runs on the west side of the swamp through Section 13. It seemed to run across and form a connection at this point, with this channel on the west side. There were no branches that I saw. At the Tule House the channel was 100 feet wide and maybe more. It was a pretty wide channel, and five or six feet deep. It would be of different widths and depths as you go along. It would depend upon the character of the land through which it passed, whether the banks were high or low.

After reaching Section 13, it formed a junction with the slough on the west side. I had an idea that this was the slough we had touched the day before, consequently I drove down this slough, following it in all of its windings, until I got to the place where we lunched on Section 1, about two miles. I then retraced my steps, and came back and followed the slough up to a point on Section 13, where it turned off. Then I followed it up to Section 24, where the slough ran out.

[Third crossing.]

We then continued along the margin of the swamp, and crossed the swamp lands through Sections 30, 32

and 33, T. 26 S., R. 22 E. Going across there I found the country perfectly flat. Crossed no channel at all coming out here on Section 33. That carried us clear across the swamp land from Section 25, to the east side of the swamp, or Section 33. We then went about a mile and a half, to the Round Corral on Section 3, T. 27 S., R. 22 E. We then followed along the margin to the center of Section 10, T. 28 S., R. 22 E., and camped that night. [Fourth crossing]. The next morning we crossed to the body of swamp and overflowed land on foot through Sections 9 and 8 to the highlands near the corral. The body of water was about a mile and a half across. The deepest water was about a foot and a half, by measurement.

After crossing we went back on the same course, as near as we could, to Section 10.

[Fifth crossing.]

We then followed along the margin of the swamp land to the southeast corner of Section 24, T. 28 S., R. 22 E., and went diagonally across Sections 25 and 35, to the corner of Section 34, T. 28 S., R. 22 E.

[Sixth crossing.]

After crossing there we went down to about the middle of Section 12, in T. 29 S., R. 22 E., and then went in a due easterly course through Sections 7, 8, 9 and 10, T. 29 S., R. 23 E. In making these two last crossings we were guided by this Map "D," which showed us that we were not likely to have any trouble. In crossing there we found a dense body of tules from the time we turned off the road until we got across to the high land on the east side. Found no channel, but sometimes found a lake or water-hole. Generally they were dry. One or two had a little stagnant water in them.

Q—Now, from your experience through the body of swamp and overflowed land, traveling around as you have been, can you state whether there is a channel through there or not?

A—I will state that there is not; that there is no connected channel through there. We crossed the swamp at these points where there was no channel. Mr. James, Mr. Jackson and Mr. Schuyler were with me on this trip. Mr. Schuyler and myself were in one vehicle together.

CROSS-EXAMINATION.

On cross-examination this witness testified: [Seventh crossing.] In going across from Section 12, through Sections 7, 8, 9 and 10, we did not go to the right or left trying to find find channels represented on this map. We just traveled on this line. We were just looking to get across that swamp without striking a channel.

Q—Did you look to see whether the channel represented upon this map, on Section 9, was there or not, a quarter of a mile from where you went across?

A—We did not vary a quarter of a mile in our trip.

Q—Did you look for a channel on Section 8?

A—We just went right through. We took a course on the mountain and went right through.

[Fifth crossing.]

Q—You stated that in making that crossing diagonally across Sections 25 and 35, T. 27 S., R. 22 E., that you did that for the reason that the map that you had made by Mr. McCray showed no water there?

A—Yes, sir.

Q—Do these sections appear in this McCray map?

A—No, sir.

Q—Then you are mistaken about that?
A—That may not be the one.

[Second crossing.]

In crossing the swamp land from the Tule House we drove right along the slough into Section 13. I have not been on that portion of the country or slough shown by this map, between the point on Section 33, to which I crossed, and the point where I left the slough, near the Tule House, when I crossed over to Section 13. The first time I went down and made trips across this swamp I found the water running down only as far as the Adobe Holes.

The next time I went down I found it running at Round Corral, on Section 3. I never was across this swamp land until I made this first trip.

Q—Did you go there to prepare yourself to be a witness in this case?

A—I went down there to see what the state of the country was.

Q—Did you go down there to prepare yourself to be a witness in this case?

A—Yes, sir. I went down there, expecting to be a witness. I wanted to see how the country appeared. I wanted to see how the country actually was. I was employed by Mr. Haggin, and have been for four years. The first time I went down there, Mr. Jastro was with me, and Mr. Cross and Mr. Barker.

J. D. SCHUYLER

Testified in relation to these crossings: I have been on the Swamp Land District 121, on two different occasions, the first was a crossing made in 1879, February, with Mr. Wible, and the other occasion was this year, with Captain Taylor, and two other gentlemen. We started on the 20th, and got back on the 24th of April. We followed along the body of the swamp,

and went to the Tule House. I think that is on Section 32; it is northwesteriy of Goose Lake. We went down the slough at the Tule House on the east side, and returned to the Tule House, and remained there over night. [First crossing. We then followed the slough up southwards, a mile or two, and then northwesterly, to the western side of the swamp. I think that slough is near the eastern margin of the swamp land. We followed the slough along there; Captain Taylor and I on the west side, Mr. James and Mr. Jackson in another wagon, on the east side. We followed down the west side of the slough until we reached a point where the slough joined another slough on the west side of the swamp. [Second crossing.] We followed the meanderings of the slough which goes by the Tule House, until we reached that point, until we arrived at the western boundary of the swamp land district. There was a large channel at the Tule House. We crossed that near the Tule House, myself and Mr. Taylor, and then kept on the margin of the slough until we got near the highland on the west side.

Q—Did you cross or see any slough making into this, near the margin of which you were passing?

A—Yes, sir; near the Tule House there was a channel striking off to the northwest. We saw no other channel after that. We followed along this channel westerly about three miles, I should think, until we came to the highland on the west side. The water was in holes along the slough, but no running water. There was a direct communication with the deeper slough on the west side, which contained a body of still water. I could not see the bottom of it that is, the western slough and this cross slough connected with it. The water appeared to be quite deep.

We passed the south end of that slough on the west side; then we followed north along the slough, until

we came to the end of the water that was in it, perhaps a mile and a half or two miles. The slough grew narrower and narrower as you came to the north end, and it seemed to come to a point, and went out; that was the end of it. We then followed along the margin of the slough southerly, until we came to some lakes or lagoons, and then went easterly across the swamp to the east side. [Third crossing.] Saw several circular ponds; saw no channels. On the east side; there was a variety of channels. In going in one direction we would run into one, and would back out and go around the head of it, and then went into another and went around that, and finally went to a place where we could cross entirely free, without going through one of these channels; that seemed to be the object, to find a level place to cross through. They appeared to be not disconnected. They were like the branching fingers of a hand; they appeared to branch out from the same point, running out. We succeeded in getting around them.

From the Round Corral we took a southwesterly course, with a view of crossing the swamp again; found a small channel, but it was dry. We went into the swamp land west, and found running water. In places it had a defined direction; spreading out over the swamp country. We did not cross it; we came right back again to the Round Corral. We found we could not get across on that line, and then returned. We followed along the margin of the running water, southerly, until we came to a point where we could go no further, and camped for the night, I should judge, on Section 10, Township 28 south, Range 22 east. [Fourth crossing.] Two of the party, the next day, waded across the water to the west side of the swamp land; I did not go across. [Fifth crossing.] After they had returned, we followed along the margin of the swamp, southerly, and took a south-

westerly course, diagonally across two sections, until we came to the south line of the township at the seventh standard, going southwest across Sections 25 and 35, Township 28 south, Range 22 east, to the southeast corner of Section 34. Going across, the country was comparatively level. There was standing water at one place; that was near the southwest corner of the first section we crossed, 25, near the southwest corner of the section. I had been calculating the distance across, and saw that we had 500 feet yet to go before we came to the corner. When we came to the slough or lagoon, it was about dinner time, and we stopped for lunch.

Q—What was the size of it?

A—It was standing water at the point we struck it, about 25 feet wide. I estimated it. We went around both ends of it; it was about a half or three quarters of a mile. We saw no outlet or inlet to it. After making this crossing we continued on down to Dover's Camp, and from there to the center of Section 12, Township 28 south, Range 22 east, took a due easterly course across the swamp land. [Sixth crossing.] Going across we found a broad expanse of tules, and an occasional patch of wire grass. Saw one or two pools of water, occasional lakes or ponds; there was no connection between them. I did not cross there. There was no slough or channel which we crossed going through there.

Q—I will ask you now whether there is a continuous defined channel through that swamp land district.

The question was objected to; objection overruled, and exception taken.

A—I can only speak of what I saw in the places I have been, and at one or two of the crossings, perhaps three, that I made in the swamp. I saw nothing that would indicate a channel.

CROSS-EXAMINATION.

On the cross-examination the witness testified: The slough which I found at the Tule House was, I should think, 250 feet wide at that particular point, and six or seven feet deep to the level of the water, and there seemed to be quite a depth of water in the slough. We continued along that slough northerly, to the end of it.

[Second crossing.]

From the Tule House we followed the Tule House channel, going south perhaps two or three miles, until we came to the deep water on the western side. It appears that the pencil line on the map between Section 32 and the Tule House and Section 1, T. 26 S., R. 21 E., was intended for the channel; but it seemed to me it must be further south than that. I think it must be through Section 7, and into Section 12, probably.

[Third crossing.]

The next crossing we made of the swamp land was from west to east, south of the lagoons. I think we started from Section 25, T. 26 S., R. 21 E., which brought us out on Section 33, T. 26 S., R. 22 E., somewhere on the south half of the section. In crossing there we found two or three standing pools of water. There were depressions between these ponds where some water might run. Only one pond was full. The water would probably run through these depressions if the water overflowed the general country.

On Section 33 we found these branching channels that I spoke of, bordered with thistles. Some of them were 20 feet wide and one foot deep; there were several of them. They were of various widths; from 20 to 25 feet wide and a foot deep; tules and smart weed growing in the bottom; but there was no water in them. It was nearly a mile and a half from the point

where we got across to the Round Corral, a mile and a quarter and five chains, I believe. The night that I waded into the swamp and attempted to cross there was but little water in there. I suppose I went half a mile. [Fourth crossing.] There was a current there, and the water was running northerly. I did not cross with the party the next day.

[Fifth crossing.]

I afterwards went across diagonally through Sections 25 and 35 to the southeast corner of Section 34.

Q—You say that after going some distance there you found the slough?

A—Yes, sir.

Q—How far was that?

A—6,900 feet from that corner. I measured the distance by the revolutions of the wheel. The water was not running in that slough. There was a little water standing in the bottom of it. There was nothing in it where we crossed it. The slough where I crossed it was perhaps two and a half or three feet deep and 25 wide. I think I crossed it on foot there, and we went around it with the teams. We went around it first on the south side, and then came back around it on the north. We went south, before we got around it, probably 1,500 or 2,000 feet.

Q—How far did you go north?

A—I did not keep any reckoning of the distance. I should judge about the same distance; perhaps 3,000 feet; that would be about one mile the two ways; a little less than a mile. The place where I struck it, I think, was the widest place. After passing that we found a broad belt of tules, and no further depressions at all.

[Sixth crossing.]

The next point we crossed was from the center of Section 12, above Dover's; took an easterly course across the swamp. We drove within 50 feet of the margin of the ponds; the ponds which we came to. One of them was elongated like a sweet potato, perhaps 500 feet long. I paid no attention to the depth or length of it. Perhaps we were half way across. I did not go to that pond or channel; probably 150 feet from it. I paid no special attention to its general course. The farthest point north at which we saw water running in the swamp land was probably nine miles in a straight line from where it came out of the ~~corral~~ canal.

The third trip across this swamp land was made on the 16th, 17th and 18th of May, 1881, and by the witnesses, George F. Thornton, A. A. Reading, F. B. McClung, D. G. McLean, Murray Taylor and Patrick Murphy; but the two witnesses last named, although placed on the stand, were not examined at all in relation to anything that they saw on this trip.

GEORGE F. THORNTON

Testified as to this trip: I have within a few days been on the body of swamp land lying between Tulare Lake and Wible's Headquarters. I started to go down there last Saturday. I think it was the 14th. I went down the swamp land to Round Corral. The water at that point, a part of it, was right on the slough. There is a slough that we came to at the Round Corral, in which the water was running; but in the tules it was standing.

I crossed that, but it was a sluggish current, two or two and a half feet deep. I drove in there about a mile, and it got boggy, and I returned to camp. The next morning we started down the swamp land south.

The next day we went about a mile south of the Round Corral. The water had extended to the margin of the tules and outside of the tules. I told Mr. McLean and Mr. Reading to go across and see how the water was; and they went entirely across the body of swamp land and returned, and then I went out myself there. I crossed there about one mile south of the Round Corral.

[This was the first crossing.]

We went in a westerly direction as near as possible. The water was clear across there, two inches to two feet deep. We then returned to the east side, going back in very nearly the same course. I got out of the channel once. There was a rank growth of tules all through, except on the salt grass island. We then followed down the margin of the swamp land to about Goose Lake and camped for the night. We attempted to go into the tules the next morning and cross again, but it was boggy, and we did not go in. It got very boggy. We then continued on south until we got, I should judge, a mile or a mile and a half north of Dover's and we crossed from the east to the west side.

[This was the second crossing.]

That was north of east of Dover's. We came to no water at all in crossing through there. I saw ponds off to one side, but no channels or sloughs. We came out about a quarter of a mile north of Dover's.

We then went down the canal about a quarter or a half a mile, and turned and went across the swamp land; did not cross in the same track that we were going over; but we crossed very nearly the same place, not exactly the same track. We saw no sloughs or channels in going across. We saw a pond and some lakes. They were not connected at all. High tules were growing between them. After crossing back to

the east side of the slough this time we came down the body of swamp land and stopped at Will's Camp. He had hogs in the tules. We attempted to examine the swamp land there. It was so boggy; the water had just got in, that we could not go in at that time, and we came back again.

[This was the attempted third crossing.]

CROSS-EXAMINATION.

On cross-examination this witness testified: The slough, in front of the Round Corral, where we camped, was 20 or 30 feet wide where I crossed it. The water was running in the slough northwest, a very slight current. I did not follow the slough at all.

The next crossing we made was about a mile south of the Round Corral. There was a slight current there in one place, moving slowly north. That water must have came from Wible's Corral, at the break. I should judge that Round Corral was twelve or thirteen miles below Dover's. I don't know how far the break is below Dover's. When we started from the east side of the swamp to go across, and came out near Dover's, I should judge we were a mile and a half northeast from Dover's. We then took a southwesterly course, and came out between a quarter and a half a mile above Dover's.

H. A. READING

Testified in relation to this trip: I was on the body of swamp land between Tulare Lake and Wible's Headquarters the 15th, 16th and 17th of the present month. First went to the Round Corral. First attempted to go across about a mile a little north of west of the Round Corral, five in a carryall; found it boggy, and we turned back. That was Sunday,

the 15th. Stopped there all night. Monday we went on the margin south about a mile, and I waded across the slough.

[This was the first crossing.]

I went as nearly due west as I could go; followed my shadow. The water was clear across. I should judge it was three or three and a half miles wide. The deepest water that I found in going across I should judge, was two feet deep. It struck me about here. [Indicating a point above the knee.] That was the deepest part through the whole crossing of the whole body of swamp land. I did not see any channel going through there. I was looking for a channel. I saw one slough to the left of where I crossed. I waded back to the easterly side completely across, following the same tracks back as near as I could. Coming back I found no deeper water than I found in going over. After getting back I got under the carryall and lay there until Dr. Thornton, Dr. McLean, Col. McClung and Mr. Murray drove across in a buggy and a buckboard. I waited there until they returned. After they returned we went south along the margin of the slough; on the east side of it; on the edge of the water; followed up the water southward. We followed that up for five miles, where we camped for the night.

The next day we went on foot about a mile and a half south, to a fence that ran towards a pond, and we then struck into the swamp again. We crossed it, completely across, from the east side to the west.

[This was the second crossing.]

We found no water. We went to the south of it.

Q—Did you find any channel in going across there?

A—In going across there, I saw a depression—one depression in going across.

Q—Did you go around that to see where it went to?

A—No, sir; in going across we did not. In coming back, we came around the south end of it. It was a slight depression I should think, not more than six inches deep, hardly. We came out on the west side, I should judge, about a mile and a half north of Dover's. The country through there was level, and filled with tules, growing all through.

After crossing there, we turned and then came back and then went on south to Will's hog camp. After passing the hog camp, we came to water, probably a quarter or half a mile; it was right south of the hog camp in the edge of the swamp.

Q—How was that water. In a channel?

A—Yes, sir; in a sort of a channel; no channel. It was in a winding slough. The slough came around something like the shape of a horse-shoe. I went across there; did not cross the whole body of swamp land; we went across and then turned out. It got pretty boggy, and we then turned out and went directly east. We went over the water in the slough, to the dry land. We went across the slough, I should judge the water was probably three feet deep. I could not tell the depth of the water. It was pretty boggy.

Q—Mr. Reading, through that portion of this swamp and overflowed land, through which you went, was there, or was there not a continuous channel?

[The question was objected to; objection overruled and exception taken.]

A—No, sir; there was not.

CROSS-EXAMINATION.

On cross-examination this witness testified: In making this crossing from a point a mile, or a mile and a half south of the Round Corral, we struck due west, as nearly as we could, across the swamp.

There was a slough at the Round Corral twenty-five or thirty feet wide. I did not cross it at the Round Corral, but down below that about a mile. I suppose there it was ten or fifteen feet wide. There was no water in it, but I could not say whether it was running or not. In the slough at the Round Corral the water was moving. I did not follow that slough at all, I did not attempt to follow it along the banks.

In making this crossing from the point near the Round Corral, I should judge the deepest water was two feet, it came up to my knees.

Q—Did you go back after making that trip to and fro, not having been in the water at any point above your knees?

A—I was above my knees in some places.

Q—How far above your knees?

A—About that far [showing] I should judge about there.

Q—You didn't get into the water at a greater depth than that on the whole trip?

A—I waded into the slough on the west side; I waded in it. I should think it took me about here (indicating a point just below the waist.) I then walked back; I didn't cross the slough; I should judge that slough was about waist deep in the channel; I waded into it, I should judge, as far as from here to that railing; probably 15 feet, something like 15 feet—maybe 16 feet.

Q—How wide was the slough where you started to wade across?

A—It might have been 30, or maybe 35 feet.

The water was not running perceptibly at that point. I waded out to see if there was a current. I then went north of it around the slough. I went 200 yards or 250.

Q—How did you get across the slough?

A—I just walked right across it. There was no slough there ; the tules came together. The water was about knee deep. When I returned I started in at the same point where I came out, where the water was about knee deep. Doctor McLean was with me on this trip; no one else.

RE-DIRECT EXAMINATION.

On re-direct examination the witness testified: When I got to the left side of the slough I went up against the west side of the swamp. I came to a slough, and I waded into that slough, I should judge, 15 feet, may have been a little more or less. There was no current there. I went around the slough on to the north side, and crossed the water; I headed it off.

When I came to the pond or slough on the west side, after I got across, that was the last water on the west side. It was on the west side that I came to that slough. That was the only body of water that I crossed that was in the nature of a slough. That was on the extreme west side of the swamp. The next water east of that, I should judge, was 150 yards, more or less.

Q—What was the nature of that bank of that slough where you went into it?

A—There were some tules growing on the edge of it. Where I went in it was sloping, and there was one step right off near the edge of the water. On the other side I think there were more abrupt places; a little steeper than the east side. I cannot state exactly because I did not go on that side of it.

F. B. MCCLUNG

Testified in connection with this trip :

Q—Do you know anything about the body of swamp land northwest of Bakersfield some little distance, south of Tulare Lake, between Buena Vista and Tulare Lake?

A—Yes, sir; I know something in regard to it. I have been on portions of that tract of swamp land. I was there last Sunday morning and Tuesday.

I struck the swamp land near the Round Corral. We went then in a southwesterly direction about a mile and a half, and went out into the swamp; found water there all through the swamp. We drove out into the swamp some distance and found we had too big a load for our team, and came out. We came back to our camp near the Round Corral and camped during Sunday night.

The next day we followed by the tules, going southward, about a mile; we then drove across the tules.

[This was the first crossing.]

Water all across there except an occasional island. The deepest water was not probably over two feet deep; just up to a man's knees. There was a solid mass of tules all the way through. I saw no channel going through there.

After reaching the west side we went up on the highland, and then returned in the same course that we went, as near as we could. We found the tules just as thick, and the country very much the same.

This return course was occasionally in the same track as the course we had taken in going across; sometimes it might have been 50, 100, or even 300 feet. The tules were very large, and we could not see where we would go, and we got out of the course sometimes. I could not say how far we were out of the original course. Crossing there, I did not notice any current whatever.

After camping that night, the next day we went along the margin of the water to a point opposite Dover's, and then drove across the swamp land to dry land.

[This was the second crossing.]

Saw no water in going across, except stagnant water in the lakes. Saw no channel on that drive—a mass of tules spreading right straight through the whole swamp, from one side to the other. With the exception of occasional alkali spots, or these lakes, we could see nothing but tules in any direction that we looked. We crossed north of Dover's. We then returned on a course north of the course we had come over, and in places I think it was half a mile north.

The appearance of the body of land in there was very much the same; just one mass of tules, broken only by the islands and occasional lakes. I saw no channel through there.

After crossing there we went to Will's hog camp, drove into the tules, and got bogged in the water, and we got out. The water was spread out over the tules. We could not tell a great deal about it. In making this trip across and over near Round Corral, we did not take exactly the same course returning. The parties leading got lost, probably. The tules were very tall. I cannot fix on the map where that crossing was made. It was just about a mile from the Round Corral. I did not notice whether there was any current in the water where we crossed there or not. I did not look very particularly to see if there was a current. I didn't take notice, but I saw no current.

Q—How far could you see from the buggy, driving across in that country?

A—Sometimes, when the tules were not so very tall, by standing on the seat we could see across the tops of the tules some distance. As a rule, you could always stand on the seat and see somewheres—in some places further than others. Some tules are much taller than others.

I am in the employment of Haggin & Car, and have been in their employment since August, 1875, and have charge of one of their ranches.

D. G. McLEAN

Testified in relation to this trip: I have been on the body of swamp and overflowed land south of Tulare Lake and north of what is called Wible's Headquarters. I was there on the 15th, 16th and 17th of May, 1881. We went first to Round Corral, on the margin of the swamp land. We attempted to go into the swamp land about two miles north of the Round Corral, but found we were too heavily loaded, and returned back to camp and remained there until the morning of the 16th.

On the morning of the 16th we went about a mile south of the Round Corral, and we waded across the slough, clear across, as near west as we could. I think it was about three or four miles. I was on foot.

[This was the first crossing.]

The deepest water was up to my knees; perhaps two feet and two inches.

Q—Did you see any channel at all in going through there?

A—I saw nothing of the sort, sir; no appearance of a channel; nothing that I believe the most prejudiced or skeptical could conceive to be a channel. Had there been a channel I should have seen it. There were tules all through there; tules all through.

After getting across we returned back by the same course, as near as we could. I then returned with the others, guiding them through. We went in buggies. We went across the same route only a portion of the way, and in returning this time we saw no channel or slough. The next day we continued up the margin of the slough to a point opposite Dover's; then crossed the body of swamp land to a point from the east side to the west.

[This was the second crossing.]

Q—Did you see any slough or channel in going across there?

A—No, sir; nothing that I could recognize as a channel or slough. It was a body of tule land; tules growing all through there. We then returned to the east, starting in a short distance north of where we came, not returning on our former track, but near it. Saw no slough or channel. We attempted to go into the slough again opposite Bonestell's, but it was too boggy, and we returned back to the margin of the swamp again, still on the east side.

CROSS-EXAMINATION.

On cross-examination the witness testified: I am the Superintendent of the Pioneer Canal. Haggin & Carr own most of that canal. The trip that I have referred to on Buena Vista Slough was the first trip I had ever made on that portion of the swamp. In making this trip across the slough from near Round Corral, Mr. Reading and myself went together. One walked directly behind the other. We were very close together. We took as nearly a due west course as we could. Followed each other's track. We did not change from that course on the trip. We made our course right across.

Q—When you got across on the high land at that point, where did you start in to return?

A—When we returned, we returned, I should judge it was, exactly the same route; started in where we came out.

We afterwards returned with the buggies and returned on the same trail that we came over, and as nearly due west as we could, varying once only to avoid some soft ground. That was in about the center of the tule land. We then drove to a point southeast of Dover's. I cannot tell how far. I could not tell whether it was 5, 10 or 20 miles, but I think it was

several miles. I did not cross the slough or attempt to cross it in front of the Round Corral. You could not call it a slough, really. At one place it was very narrow and then, again, it was wide. In some places I think it was 12 or 15 feet wide, and in some other places 50 or 100 feet. I could not say positively whether the water was running there or not.

We attempted to make another crossing at the south end of what is called Dover Island; drove in a short distance. It was very boggy and we returned and went out again to the margin and I never went back again.

RE-DIRECT EXAMINATON.

On re-direct examination the witness testified: In making this trip across from near the Round Corral with Mr. Reading, he gave out just before we got to the west side, almost entirely; then I went on and prospected clear through; I went on to the high land and then came back and reported to him, and he went through to the high land.

RE-CROSS EXAMINATION.

Q—When Mr. Reading gave out on this trip across there, how far was he from the west margin of the swamp land?

A—To make a rough guess, I should guess two or three hundred yards. After he gave out I continued right through to the west, and when I went back to him I went back the same route I came. I went to him again to the edge of the high land, and told him I would rest and he could go ahead.

The defendant did call three witnesses who had been on Buena Vista Slough with cattle, but their testimony shows that their information in relation to the country between Buena Vista Lake and Tulare Lake is meagre, and the evidence in the main corroborates that of plaintiffs' witnesses. The witnesses were:

A. GLENN,

Who testified (Vol. 3, fol. 594):

I know the swamp land district between Tulare and Buena Vista Lakes. I was there first about 1857, and was there until 1860. I was down there with stock in 1860, 1861 and 1862. I was back there in 1867, and in 1873 or 1874, attending stock. I crossed this body of swamp land in 1857 and 1859, on a road running from Visalia to San Luis Obispo, at a point five or six miles above the head of the lake—south. Crossed no water on that road later than 1861 and 1862.

Q—Was there any dry channel or washout that you saw?

A—*I don't think there was. Of course, I didn't pay much attention to it. I was just crossing on horseback.* (Vol. 3, fols. 597–8.)

I was down there in the spring and fall of 1857, 1858, 1859 and 1860. The first time I saw a sheet of water connecting Buena Vista and Tulare Lakes was in 1861 or 1862, and again in 1867. I never saw a connection of water between those two lakes at any other time. *I did not live around there at all. I was merely traveling around through the country.* I was down there every fall except the years I tell you. *I never entirely crossed the swamp land; have been in quite a ways. I have been there when there was plenty of water, and have been there again when it just stood in pools. I don't think there were connecting channels between these holes at the time. Of course, I did not pay any particular attention.* (Vol. 3, fol. 602.)

They were most generally running north and south. Of course, when I was riding through the country, I never expected to be called to tell anything certainly, and I never paid any attention to it, because I was hunting for stock. (Vol. 3, fol. 603.)

I never heard it called a watercourse or stream of water.

CALVIN DUNLAP

Testified (Vol. 3, fol. 604):

I am some little acquainted with the *Buena Vista Slough country*. First recollect it in 1861. I was then 13 or 14 years old. I was then looking out for stock for my father. I was there pretty nearly every year, in the spring and fall, from 1861 to 1874. I saw the water connected from Buena Vista Lake to Tulare Lake in 1861 and 1862 and 1867, but not at any other time that I know of. Our range was from Goose Lake to Tulare Lake. I crossed the swamp land district in 1867, when the water was up. It was in the spring. The water was running. In places we would swim, and in other places it was not more than knee deep to a horse. At that time I was not acquainted with the district, only up and down the side. I have crossed it when the water was in holes. That was in the fall. The water was standing in kind of holes, pools or sloughs, up and down, as well as I remember. In places there was no channel; no connecting channel between the pools that I know of.

"Q—No sign by which you could tell where a "channel was in crossing?

"A—No, sir; I think not. I have probably been "across there a dozen times or more during those "years."

CROSS-EXAMINATION.

We swam it in 1861 and '62 and 1867, when the water was high. I have crossed it other years in the fall, nearly every fall; that is, up to 1874.

J. P. MURRAY

Testified (Vol. 4, fol. 1496):

I have been in the stock business since 1852. Have

been in the stock business in Kern County from Tulare Lake south. My cattle ranged all over the island here and around Kern and Buena Vista Lakes, and from Tulare Lake to those points. First brought cattle here in 1864, a pretty dry year, the most of it; a year of great drought. I brought 1000 or 1200 head. I bought them from a man who had them at the head of Tulare Lake, and in the swamp at the south end of Tulare Lake, *where Buena Vista Slough goes into it.* The cattle would range from Tulare Lake and Goose Lake, and further south. I worked my cattle that year up to Old River; the water was down in the swamp that year, standing in holes. A great many cattle were driven into the tules and salt grass to save them, because it was a dry year—probably 35,000 or 40,000 head and more. I first knew of Mr. Crocker having cattle there in 1869 or 1870. In 1869–70–71 there were probably 40,000 or 50,000 cattle there. Crocker, Miller & Lux had cattle there then; 1871 was a dry year.

Q—How is it as to the existence of any continuous channel through that swamp from Wible's headquarters to Tulare Lake?

A—Well, there is not much of a channel along there. There are some sloughs along there, but after you get down to where Wible's camp is now, this Buena Vista Slough that comes down about there, a little below, if I recollect well, it spreads out all over the country.

Mr. Murray accompanied Thornton and others on the trip of 16th, 17th and 18th May, when they crossed this body of swamp land three times and attempted a fourth crossing at Will's hog camp, still he is not asked a single question as to what he saw on that trip, although he made the trip but nine days before he is on the stand as a witness.

This was all the testimony offered by the defendant to prove that there was not a continuous slough or channel from Buena Vista Lake to Tulare Lake, except the testimony of the engineers who ran a level line across Township 29 south, Range 23 east, to which we shall call attention hereafter.

It will be seen that the three last witnesses are the only ones who ever visited the country between the lakes, at any time prior to a few weeks before the trial of this case, and they seem to have only been on that portion of Buena Vista Slough, between Goose and Tulare Lakes, and of that portion they knew very little, having merely crossed it and and never in the spring, except in 1861-2 and '67 and they found swimming water.

Level line run by Macmurdo and Fllle-brown across Secs. 7, 8, 9 and 10, Tp. 29 S., R. 23 E., to centre of Sec. 12, Tp. 29 S., R. 22 E.

We will now briefly call attention to the evidence introduced by defendant in connection with the level lines run by Macmurdo and Fillebrown across Sections 7, 8, 9 and 10, Township 29 south, Range 23 east, and to the centre of Section 12, Township 29 south, Range 22 East, and we think this Court will see that no reliance can be placed upon such evidence, and that the attempt to break the continuity of Buena Vista Slough by showing that a level line run across the swamp land would not and did not show a water channel, was an utter failure.

It will be noticed that this point of attack upon the channel, *i. e.*, across Sections 7, 8, 9 and 10, Township 29 South, Range 23 east, and into Section 12, Township

29 south, Range 22 east, was a favorite one with all defendant's witnesses.

April 14 and 15. Taylor and others make a crossing there.

April 21–23. Taylor, Jackson and others again cross at or near the same point.

April 28. Jackson acts as guide, and takes Macmurdo and Fillebrown down to run this level line.

It is true that the witness Fillebrown says that the point at which this crossing was made was selected solely for the reason that "it appeared to present a favorable point for crossing," (Vol. 4, fol. 341), and that it was not selected in advance, and that no one in in particular told him of that point.

And also that the witness

MACMURDO

Testifies to the same effect. (Trans., Vol. 4, fols. 1349–51.)

"Q—Why did you select this point in Section 11, "as the starting point, in making this survey?

"A—We had no particular reason for selecting that "point; we might have selected any other just as "well, etc. * * *

"Q. What sent you to Section 11, to look for a "point?

"A. Well, nothing; there was no reason why we "did go. * * * He (Harrold), showed "us what he supposed to be the corner, and we started "from that.

"Q—That was your only reason for taking that "point?

"A—That was the only reason, sir."

But let us for a moment turn to the testimony of the witness

C. G. JACKSON,

Who took Macmurdo and Fillebrown down to this crossing, and see if the point was selected solely by chance:

"Q—You were down on this swamp land again with "Mr. Fillebrown and Mr. Macmurdo?

"A—Yes, sir.

"Q—When you were down there, how far from "where you came out on the east side was it that you "started in on the trip when you run the levels across?

"A—It might have been a quarter of a mile. I "don't understand the question.

"Q—How far north from where you had come out "on that previous trip did you start on making the "second trip across?

"A—Possibly a quarter of a mile.

"Q—Did you see your wagon-tracks or trail when "you were down there the second time?

"A—I believe I did. That is my impression now. "I saw the point where I came out.

"Q—Whose house is it that you came out near down "there?

"A—I don't know. There is a house there.

"Q—When you made your first trip across there, "going west, about how near did you come out to that "house?

"A—About a quarter of a mile south of it. When "we went back on the next trip we started at about "that house, a little to the west of the house and "about a quarter of a mile from where we had been "the day before.

"Q—In going to the house, did you cross your "wagon-tracks on the second trip?

"A—Yes, sir. Then we went about a quarter of a "mile further on.

"Q—Did you tell these parties about having made "a trip across there before?

"A—Yes, sir.

"Q—They knew where you went across.

"A—Yes, sir; they knew I had been across on or "about there. I don't know that they knew where I "had crossed.

"Q—And didn't you talk about it when you were "there?

"A—Yes, sir.

"Q—And you were going back on pretty nearly the "same line you went on before?

"A—Yes, sir." (Trans., Vol. 4, fols. 568–571.)

MR. DIXON,

Who assisted in running this level line, testified: That he assisted in making the survey, and that they tried to start from a section line near Harrold's house. Harrold showed them a point where he had seen a stake which was burnt up. Jackson was along, and said he had crossed there a few days before.

"If you want to know why we selected that place, "we had a map that we ran by down there; we selected "that place on account of having that map with us." (Vol. 4, fols. 737–8.)

We will now examine the testimony of Macmurdo and Fillebrown, and see if any more reliance can be placed upon their testimony in relation to what they found on that trip than can be placed on that relating to the reason for selecting the place of crossing.

FILLEBROWN

Testified: That he ran this level line through Sections 10, 9, 8, 7, Township 29 south, Range 23 east, and into Section 12, Township 29 south, Range 22 east, and found no channel; did find a pond. (Vol. 4, fols. 255–6.)

A profile of the level line run by this witness is offered in evidence (Exhibit L), and witness says it correctly represents the line run across the body of swamp land. (Vol. 4, fols. 257 and 260.)

The witness then reads the elevation at each station, and says:

"You will understand that the elevations I give you "are just 100 feet apart, just one station apart." (Vol. 4, fol. 265.)

And this the witness repeats at folios 266–272 and 273.

The "pond," he says, was at the 115th station, between the 114th and 115th stations. (Fol. 275.)

He then gives 31 stations made in going around this "pond" south, and then comes around to Station 115, 100 feet from Station 114, which was on the east side of the "pond." (Fol. 278–80.)

The profile (L) includes the detour of the pond. (Vol. 4, fol. 282.)

On cross-examination he testified that the "pond" was about 11,500 feet from the starting point and about 10,000 feet from the center of Section 12 (Vol. 4, fol, 338), and he fixes the location of the "pond" on "Map D" by a pencil mark on the east half of Section 8.

The line run by us did not run at right angles with the swamp land but diagonally down the valley, which was the reason that the line run indicated a falling of the country. (Vol. 4, fol. 283)

The terminal point on the west side was nine feet lower than the initial point. (Vol. 4, fol. 339.)

On Cross-Examination.

"Q—I understand you to say that you fixed your "levels at every 100 feet?

"A—Yes, sir." (Vol. 4, fol. 327).

And this is repeated at folio 328.

MACMURDO.

In testifying in relation to this level line, says the stakes were 100 feet apart; that they were measured by a wagon wheel, and by stepping off. (Vol. 4, fol. 1103.) That in four miles the stepping was only 20 paces off. (Vol. 4, fol. 1106.)

He fixes the "pond" at 12,400 feet from the starting point, or at the 124th station (Vol. 4, fols. 1109, 1137 and 1291), 1,000 feet from the point where Fillebrown fixed it. He says the profile (Exhibit L), is correct. (Vol. 4, fol. 1112.)

He repeats that the stations were 100 feet apart. (Vol. 4, fol. 1114.)

He produces another profile, Exhibit M, which has on a separate line, the line that they ran around the south end of the "pond," 31 stations, and between stations 124 and 125 (Vol 4, fol. 1136–9.)

He then testifies that both Exhibits L and M, show the same line and that both are direct lines. (Vol. 4, fol. 1141.)

A third profile, "Exhibit N," is produced and offered in evidence of this level line, and made from the same notes. (Vol. 4, fol. 1170.)

He says, 396 revolutions of the wheel, which was used in making the crossing, made a mile. The note in the book of Fillebrown is "Station 211, to 1600 "revolutions equal to four miles, to the centre of Sec- "tion 12." 211 stations was equal to 1600 revolutions or four miles. (Vol. 4, fol. 1290.)

The distance around the "pond," was 31 stations. Kept no record of the course of these stations. (Vol. 4, fol. 1291–2.)

We ran on a straight line through 1600 revolutions and then made a deflection. (Vol. 4, fol. 1294.)

The difference in the length of the profiles represented by Exhibits L and N, is the distance around

the "pond," 31 stations of 100 feet or 3100 feet. (Vol. 4, fol. 1294–5.)

He then gives the elevations of the stations around the pond, showing that three of them were respectively 2 feet 1 inch, 2 feet 4 inches and 2 feet 1 inch lower than Station 125. (Vol. 4, fol. 1299–1300.)

In going across there, we made 211 stations in a straight line, and then 11 more to the centre of Section 12. We had gone 4 miles before we tried to go to the centre of Section 12. (Vol. 4, fol. 1312, 1313.)

The note in Fillebrown's book opposite Station 211 is: "Post at centre of Section 12, T. 29, R. 22 bears S. "seventy-four degrees W., eighty revolutions, sixteen "chains." (Fol. 1314.)

Opposite Station 98, appears a note as follows:

"Station 98; 877 revolutions on the Slough, about "1.5 deep; runs out in 2 or 300." (Vol. 4, fol. 1334.)

Opposite Station 124, in Fillebrown's notes is this note.

"On east bank of long stagnant slough about four "feet deep; water one foot; points running south "around the end of the slough." (Vol. 4, fol. 1341.)

The distance from the center of Section 12 to Station 125 was 9656 feet, and from the starting point to Station 125 was 12,500 feet. (Vol. 4, fol. 1347.)

The witness fixes the position of this pond or slough on a diagram made by him. (Vol. 4, fols. 1348–9 and 1391–2.) "Plaintiffs' Exhibit 39."

Still another profile of this level line is produced and introduced in evidence, "Exhibit P." (Vol. 4, fols. 1375–6.)

We ran across the 211 stations, and from that point 16 chains to stake, the center of Section 12. (Vol. 4, fols. 1392–3.)

The witness

L. L. Dixon

Testified (Vol. 4, fols. 737–746) that he kept charge of the revolutions of the wheel; that he did not know its size, or how many revolutions it took to make one hundred feet; he knew when he had gone one hundred revolutions and marked it down, and that was all he knew about it. I gave them the revolutions whenever we stopped for lunch or for the others to come up, but at no other time. We made 1600 revolutions to the west side. Then I went off and found the section corner for them.

" Q—How could you tell in going across there when " you had made 100 feet?

" A—It didn't make any difference, I suppose; I " kept the tally of the revolutions."

We did not measure each 100 feet; we put down no stakes at all. The levelers were from 100 to 300 or 400 yards behind us.

We were within a few hundred yards of the pond when we took lunch, mabbe one-half or three-quarters of a mile. (Vol. 4, fols. 747–8.)

" Q—When did you first give them the number of " revolutions that the wheel had made?

" A—When we stopped for lunch.

" Q—Not before that?

" A—No, sir; I may have done it; I would not be " positive; *if I did they noted it at the time.*

" Q—When did you give them the number of revo- " lutions again?

" A—I gave it to them when we got to the end; the " tally that I had made." (Vol. 4, fols. 748–9.)

An attempt was made on the re-direct examination of this witness to show that Macmurdo was given the tally more than twice in making this crossing. (See Vol. 4, fol. 787–792.)

But the notes made by Fillebrown show that it was only given to him twice, first at the point where they lunched, Station 98, 877 revolutions from the starting point, and second at the end of the straight line, or at Station No. 211.

This Court will see that the defendant did not attempt to show that any of its witnesses had ever attempted to follow Buena Vista Slough from Buena Vista Lake to Tulare Lake. They selected certain points between Buena Vista and Tulare Lakes, and crossed the body of swamp and overflowed land, and then testified to what they found on such trips, all these trips were made through a dense growth of tules, so high that the parties could not see to the right or left. This clearly appears by the testimony of all the witnesses.

FILLEBROWN

Testified as to the condition of the tules across Sections 7, 8, 9 and 10, Township 29 South, Range 23 East, where all of the witnesses of defendant, who made the trip across the swamp land crossed.

Q—"Did you notice the slough, or channel to the north of that line running right along parallel with it within a quarter of a mile of that point.

A—No, sir, I did not. The line was considerably grown up with tules, and I could see that far only at a very narrow point, where there was an opening or elevation of the ground. We walked through those tules.

Q—How could you see through them?

A—We drove the wagon ahead of us, dragging a log behind it, and a man standing on the log, and broke them down.

Q—Then they were broken down all the way through?

A—Yes, sir; the tules were taller than myself; a

good deal taller than myself; 10 or 12 feet high. (Vol. 4, fol. 335–6.)

Q—I understand that in going across you simply kept on that line within the high tules, neither going to the right nor to the left?

A—Kept as straight as we could." (Vol. 4, fol. 341–2.)

McClung

Testified to the same effect. "A dense growth of tules." (Vol. 4, fol. 441.)

Schuyler

Testified that in going across at the same point with Thornton and others. "Going east across there we found a broad expanse of tules and an occasional patch of wire grass or salt grass." (Vol. 4, fol. 838.)

McLean

Testified to the same effect. (Vol. 4, fol. 1521.)

The next point crossed north of this line through Sections 7, 8, 9 and 10, Township 29 south, Range 23 east, was diagonally through Sections 25 and 35, Township 28 south, Range 23 east.

Schuyler

Testified that this line was flat land covered with tules. (Vol. 4, fol. 837.)

Of the next line north near the Round Corral crossed by Reading and McLean on foot, and Thornton and others in buggies.

McLean

Says: "It was tules all the way through there." (Vol. 4, fol. 1517.)

"After going out some distance, we were fearful of not finding our way back, and we marked the way back as near as we could with land marks by breaking tules." (Vol. 4. fol. 1518.)

READING

Says: "There were tules all the way across, with the "exception of those high knolls. The tules were "growing pretty high; above my head. They were "dense; very thick." (Vol. 4, fol. 630.)

THORNTON

Testifies: "There was a rank growth of tules through "there, all through, except on these salt grass islands. "*The whole body of the swamp land, except the salt grass "islands, was covered with a heavy growth of tules.* (Vol. 4, fol. 597.)

The trip through Sections 8 and 9, Township 28 south, Range 22 east, made by McClung, and on foot, was through tules all the way. (Vol. 3, fol. 435.)

And at folio 437

TAYLOR

Says: "I went back and followed the same course as "near as I could, because the tules were broken down "by the trail, and I did not want to make a new trail."

Across Secs. 30, 32 and 33, "I found a perfectly "level country; tules all the way across." (Taylor's testimony, Vol. 3, fol. 452.)

It affirmatively appears, from the testimony of the defendant's witnesses, that where they made all the crossings of this body of swamp land, that it was covered with a dense growth of tules, all except the few small knolls covered with salt grass, so high and dense that the witnesses had to mark the trails by breaking down tules to enable them to return by the same route.

Such being the fact, how could they tell anything about the condition of the country outside of this buggy track or foot-prints? So, admitting that they found no slough at any point where they crossed, some half-dozen different places, we then have a break in the

channel of Buena Vista Slough at such points of say ten feet, and no evidence whatever that outside of such narrow space the channel did not appear on each side, and the evidence of plaintiff's witnesses as to Buena Vista Slough being continuous and well defined outside of such half-dozen places, stands unimpeached.

But do the witnesses of defendant establish that there was no channel where they crossed the swamp and overflowed land?

We will take in order each crossing made by these parties started out by the defendant with the intention of finding no slough or channel.

The first party consisted of M. F. Taylor, Vining Barker, E. D. Cross and H. A. Jastro.

FIRST CROSSING.

From a point north of Fstee's camp to Round Corral, through Secs. 30, 32 *and* 33, *Tp.* 26 *S., R.* 22 *E.*

TAYLOR

Says: "Q—In crossing, did you find any channel at "all?

"A—No, sir; it was as flat as this floor" (Vol. 3, fol. 388.)

JASTRO

Testified: "Q—Did you find any channel in crossing "that swamp?

"A—No channels that I could see." (Vol. 3, fol. 365.)

CROSS

Testified: "Q— * * * Did you strike any water "there?

"A—Yes, sir. We found sloughs of water all the "way across from place to place. * * * And "there was one place where there was water flow- "ing, where we made the crossing." (Vol. 3. fol. 476.)

BARKER

Testified: "In making that crossing, we struck water "on the west side of the swamp. I think we crossed "water in three different places. * * * It ap- "peared to be going down the swamp, towards Tulare "Lake. * * *

"Q—Did you see any channel from there at all?

"A—We struck depressions in places and some "places we struck where there were channels.

"Q—Continuous channels?

"A—I could not say that they were.

"Q—In going across there, would you say that there "was a channel through that body of swamp land, a "continuous channel.

"A—No, sir. I could not. We struck channels in "places, and some places we followed them where they "would run north, and there would be a little depres- "sion; but I would not say there was a channel. After "reaching Round Corral, we went up on the east side "of the swamp to the Tule House." (Vol. 3, fols. 615 to 617.

It will be seen that Taylor finds the country as level as a floor, but he finds the whole country equally level.

Jastro *sees* no channel. (Vol. 3, fol. 365.)

But this is the witness who saw no indications of a channel at the Tule House.

"Q—Did you find any indications of a channel at "the Tule House?

"A—No, sir." (Vol. 3, fol. 367.)

Every other witness placed on the stand by plaintiffs or defendants testified to there being a large and prominent channel at the Tule House, some placing it 150 feet wide, others 300 feet and more. Both Baker and Cross find not only channels in making this crossing, but water running in them.

While Cross finds sloughs all the way across and Barker finds channels, but he cannot say that there was a continuous channel through the body of swamp land.

SECOND CROSSING.

From Tule House east or southeast.

All four of the witnesses find a slough on the west side of the swamp land, and three of them on the east side at the Tule House, and all of them a connecting slough from the Tule House slough to the slough on the west side.

THIRD CROSSING.

Through Sections 31, 32 *and* 33, *T.* 26 *S.*, *R.* 22 *E.*

TAYLOR

Sees no channel at all going across to the Round Corral. (Vol. 3, fol. 398.)

JASTRO

Crossed no channel at all going to the Round Corral. (Vol. 3, fol. 368.)

CROSS

Testified: "Q—Did you find any channel on your "route back to the Round Corral.

"A—Well, I suppose that is a channel; the channel "is about five miles in length, I should judge.

"Q—Was it a continuous channel?

"A—For five miles." (Vol. 3, fol. 481.)

BARKER

Testified: "Q—Did you find any channel north and "south, going back to the corral?

"A—We did strike one or two places that we drove "around in the middle of the swamp.

"Q—It appeared to have no continuous channel?

"A—No, sir." (Vol. 3, fol. 619.)

Here again Taylor and Jastro see no channel, while Cross sees one five miles long, and Barker is evasive, but finds "places" that they had to drive around, but no *continuous* channel.

FOURTH CROSSING

To Dover's through Sections 23 *and* 35, *Tp.* 28 *S., R.* 22 *E.*

TAYLOR

Finds nothing to *indicate water.* (Vol. 3, fol. 401.)

JASTRO

Finds water in holes and drives around them. (Vol. 3, fol. 368.)

CROSS

Testified: "Q—What did you see on that trip in the "way of water?

"A—There were little sloughs and ponds all of the "way along. * * * I don't think there was a con- "nected channel between those points." (Vol. 3, fol. 483.)

BARKER

Testified: "Q—Did you find any channel in going "through there?

"A—There was a slough that crossed that channel "on the west side, as we went over, with a little water "in it; no running water.

"Q—How large a slough was that?

"A—Well, where we crossed it, there was quite a "large slough; that is, it was not deep, but——

"Q (interrupting)—Did you see the end of that?

"A—We did not follow that there, when we crossed "it to the end." (Vol. 3, fols. 620–21.)

Again Taylor found no slough, or *indication* of water even. Jastro forsakes him, and finds water, while Cross and Barker, as usual, find both water and channels.

FIFTH CROSSING.

From Dover's, through Secs. 7, 8, 9 *and* 10, *Tp.* 29 *S., R.* 23 *E.*

TAYLOR

Finds no water, only a hole. (Vol. 3, fol. 405.)

JASTRO

Testified: "In crossing we found water. It was not "running. It seemed to be standing in the slough. "* * * The water was 25 feet wide. I saw the "end of it northward, but not the south end." (Vol. 3, fol. 370.)

CROSS

Finds nothing that he could call a channel; found large holes, but no defined channel between them; that is at low stages of water. (Vol. 3, fols. 485–6.)

BARKER

Found water on the west side and crossed it; don't know whether it was in a channel. It was in a hole, not running, (Vol. 3, fols, 621–2,)

Taylor, as usual, finds no water. Jastro finds a slough; Cross, a high-water channel. Barker don't know whether what he finds is a slough or not.

SECOND TRIP MADE BY M. F. TAYLOR, J. D SCHUYLER, WALTER JAMES AND C. G. JACKSON,

April 21, 22 *and* 23, 1881.

FIRST CROSSING.

North of Tule House, through Section 19, *Tp.* 25 *S., Range* 22 *E., and Section* 24, *Tp.* 25 *S., Range* 21 *E.*

JAMES

Says he found no channel, no evidence of a channel, but found a large slough north of the crossing and towards Tule Lake. (Vol. 3, fols. 194–5.)

JACKSON

Found a slough and followed it up about a mile (Vol. 4, fols. 470–1, and Cross-Examination, fols. 554–5), and found the same slough that James did running to Tulare Lake.

TAYLOR

Finds the same slough towards Tulare Lake, but is silent as to whether he found a slough in crossing over from the Tule House. (Vol. 3, fol. 409.)

SCHUYLER

Finds a slough on both the east and west side of the swamp land and followed them both. (Vol. 4, fols. 813–14.)

So, in this crossing James saw no channel or indication of a channel. Jackson, who is in the same buggy (Vol. 4, fol. 814), saw a slough and followed it a mile.

Taylor is silent, and Schuyler, who is riding with him, saw two sloughs and followed them both. (Vol. 4, fol. 814.)

SECOND CROSSING.

From the Tule House to the West Side.

All four witnesses found a well defined slough at the Tule House, but they follow it south but a short distance. They all find a well defined slough running across the swamp land and connecting with a well defined slough on the west side of the swamp land.

This west slough they followed,

JAMES

Says, one-half a mile to Section 12, T. 26 S., R. 21 E., (Vol. 3, fol. 205), or a mile about. (Vol. 3, fol. 270.)

TAYLOR

Says he followed it two miles (Vol. 3, fol. 426), and then from Section 13 to 24 north.

SCHUYLER

Says he followed it north one and a half or two miles. (Vol. 4, fol. 818.)

THIRD CROSSING.

From Sec. 31, *Tp.* 26 *S.*, *R.* 22 *E.*, *to Section* 33, *Tp.* 26 *S.*, *R.* 23 *E.*

JAMES

Says: We found no channel at all; nothing to indicate a channel. Found some ponds on the west side, 200 or 300 feet across. (Vol. 3, fols. 207–8.)

JACKSON

Says: We had an instrument by which we fixed the course. We took a course S. 78½° E. Going across there I saw a couple of small ponds. * * We saw no slough or channel through there. We struck the east side about a mile and a half, by the wheel of our wagon, northwest from the Round Corral. (Vol. 4, fols. 493–496.) That would bring us about Section 33, T. 26 S., R. 22 E. (Vol. 4, fol. 563.)

TAYLOR

Says: Crossed the swamp land through Secs. 30, 32 and 33, T. 26 S., R. 22 E. *Going across there I found the country perfectly flat.* "Crossed no channel at all coming out here at Section 33." (Vol. 3, fol. 428.)

SCHUYLER

Says: "On the eastern side there was a variety of "channels. In going in one direction we would run "into one; we backed out and went around the head "of it, and then we went into another and around that;

" and finally got to a place where we cut across entirely " free, without going through one of these channels. " That seemed to be the object, to find a level place to " cross through. They appeared to be not disconnect- " ed; they were like the branching fingers of a hand.

" Q—Having no continuous channel through the " swamp?

" A—No, sir; they appeared to branch out from the " same pond, running out; and we succeeded in get- " ting around them." (Vol. 4, fols. 823–4.)

" On Section 33 we found these branching channels " that I spoke of bordered with thistles. Some of " them were 20 feet wide and one foot deep. There " were several of them. They were of various widths, " 20 or 25 feet wide. * * It was a mile and a quar- " ter and five chains from where we crossed to the " Round Corral." (Vol. 4, fols. 845–6.)

On this crossing neither James or Jackson see a channel. Taylor says he crossed no channel, while Schuyler saw numerous channels, but says the object was to go around those channels in such a way as not to cross them.

Fourth Crossing.

Through Sections 9 *and* 10, *T.* 28 *S.*, *R.* 22 *E., and back, by James and Taylor only, and on foot.*

James

Found no channel in crossing; water all the way; running in places, and in places still. (Vol. 3, fol. 213.)

Went in a crooked line. In case we came to ponds and islands we would go around. (Vol. 3, fols. 281–2.)

Jackson

Says: James and Taylor waded across. (Vol. 4, fol. 502.)

JAMES

Says: Water all the way across about a mile and a half; deep fresh water about one and a half feet deep.

FIFTH CROSSING.

Diagonally through Sections 25 *and* 35, *T.* 28 *S., Range* 22 *E.*

JAMES

Says: We found no indications of a channel in going through there. (Vol. 3, fols. 215–16.)

And on cross-examination he testified:

" Q—I understand you found no water there, mak-
" ing that trip?
" A—I crossed no water.
" Q—Do you say you found no water?
" A—I didn't say I found no water.
" Q—Then you did find water?
" A—I don't remember. We may have passed in
" sight of water, but we crossed no water.
" Q—Did you go out of your course at all to avoid
" crossing water?
" A—No, sir. We kept nearly in a straight line all
" the way across. * * I don't know whether I
" saw water or not. * * I don't remember that
" we saw water on our right or left in crossing." (Vol. 3, fol. 288–290.)

JACKSON

Says: Going through there, the crossing, the country was covered with tules, apparently level. We found water as near as I could get at it, about the southwest corner of Section 25, or, the northeast corner of Section 35. It was not running, it was a pond of water. We went around the south end of it, did not go around the north end. Other parties went around the north end. There was no slough running in or out of it,

that I saw. That pond I should judge was all of the way from forty to sixty feet wide, and three or four hundred yards long. (Vol. 4, fols. 504 to 506.)

TAYLOR

Says: We went diagonally through Sections 25 and 35. (Vol. 3, fol. 438.)

He is not questioned about channels nor does he volunteer any information.

SCHUYLER

Says: Going across, the country was comparatively level. There was standing water at one place; that was near the southwest corner of the first section we crossed, 25, near the southwest corner of the section. I had been calculating the distance across, and saw that we had 500 feet yet to go before we came to the corner. When we came to the slough or lagoon, it was about dinner time, and we stopped for lunch.

Q—What was the size of it?

A—It was standing water at the point we struck it, about 25 feet wide. I estimated it. We went around both ends of it; it was about a half or three quarters of a mile. We saw no outlet or inlet to it. (Vol. 4, fol. 832 to 834.)

And on cross-examination he said: I afterwards went across diagonally through Sections 25 and 35, to the southeast corner of Section 24.

Q—You say that after going some distance there, you found the slough?

A—Yes, sir.

Q—How far was that?

A—6,900 feet from the corner. I measured the distance by the revolutions of the wheel. The water was not running in that slough. There was little water standing at the bottom of it. There was nothing in it where we crossed it. The slough where I crossed it was

perhaps two and a half or three feet deep and twenty-five wide I think I crossed it on foot there, and we went around it with the teams. We went around it first on the south side, and then came back around it on the north. We went south before we got around it, probably 1,500 or 2,000 feet.

Q—How far did you go north?

A—I did not keep any reckoning of the distance. I should judge about the same distance; perhaps 3,000 feet, that would be about one mile the two ways; a little less than a mile. The place where I struck it, I think, was the widest place. After passing that we found a broad belt of tules, and no further depressions at all. (Vol. 4, fol. 851 to 853.)

On this crossing, James sees no indication of a channel and no water.

Jackson finds "a pond of water," and goes around one end of it with James, but not the other. The "*pond*," is 40 or 60 feet wide and 300 or 400 yards long. (5,000 feet, Schuyler says.)

Taylor is not asked what he found on this crossing, although he went around this slough with Mr. Schuyler.

Schuyler finds a slough a mile long with water standing on it 25 feet wide, upon which the whole party stopped for lunch.

Still Mr. James sees no indication of this slough that he stops to lunch on, and although he drives 3,000 feet along its banks to get around the north end of it.

Sixth Crossing

Is across Sections 7, 8, 9 *and* 10, *Tp.* 29 *S.*, *R.* 23 *F.*, *at the same point where Taylor, Barker, Cross and Jastro made their last, or fifth crossing.*

JAMES

Says: In crossing they found no channel or indications of a channel. It was one level unbroken country, flat and covered with tules. Saw some water on Section 8. (Vol. 3, fol. 217-219.)

JACKSON

Says: Saw two ponds of water. I should judge on Section 9. One was round, the other in the nature of a slough or arroyo. Going across there, we crossed no channel or slough. (Vol. 4, fol. 512–513.)

TAYLOR

Says: In crossing I found a dense body of tules all the way across. Found no channel, but sometimes found a lake, or water hole. (Vol. 3, fol. 441.)

SCHUYLER

Says: We found a broad expanse of tules. Saw only one or two pools of water, basins like or ponds. There was no connection between them. There was no slough or channel which we crossed in going through there. (Vol. 4, fol. 838–9).

And on

CROSS-EXAMINATION:

One pond was perhaps 500 feet long. I paid no attention to the depth or length of it, or its general course; were within 150 feet of it. (Vol. 4, fol. 855–6.)

Here again James sees no channel or indication of a channel. Jackson sees a pond resembling a slough or arroyo. Taylor found no channel, while Schuyler found a "pond," 500 feet long, but fails to examine it at all or go more than 150 feet to it, although he is going there to look for channels and sloughs.

'THE THIRD TRIP WAS MADE BY GEO. F. THORNTON, H. A. READING, F. B. MCCLUNG, D. G. MCLEAN, PAT MURRAY AND M. F. TAYLOR.

It will be seen that Taylor was along all three trips.

The

FIRST CROSSING

Was made about one mile south of the Round Corral.

Of this crossing, Reading, who went across on foot with McLean, says he found water clear across, 3½ miles; the deepest water was two feet; saw no channel. (Vol. 4, fol. 628–630.)

ON CROSS-EXAMINATION

He says: There was a slough at the Round Corral 20 or 25 feet wide, and that the slough where they crossed one mile south of Round Corral was 10 or 15 feet wide. Found a slough on the west side 30 or 35 feet wide; waded into it 15 or 16 feet, and found water about waist deep in the channel. Then went 200 or 250 yards north and around it.

MCLEAN,

Who waded across with Reading, says he found 3 or 4 miles of water from high land to high land that would average 6 or 8 inches; the deepest was just up to his knees, perhaps 2 feet 2 inches.

" Q —Did you see any channel at all in going through " there?

" A—*I saw nothing of the sort; no appearance of a " channel; nothing that I believe the most prejudiced or " skeptical could construe as a channel. Had there been " a channel, I certainly should have seen it.*" (Vol. 4, fol. 1515–16–17.)

He, made this trip with Reading, one party walked directly behind the other going west all the time, and didn't change that course once on the trip. (Vol. 4, fol.

1554–7.) He then guided Thornton, Murray and McClung across at the same point in a buggy. On that trip he saw no channels or sloughs. (Vol. 4, fol. 1518.)

THORNTON

Testified: That water was clear across from two inches to two feet deep. A rank growth of tules all the way through. (Vol. 4, fol. 595–7.) There was a current to the water, running slowly north. (Vol. 4, fol. 611.)

He is not asked about channels or sloughs, and volunteers no information.

MCCLUNG

Says: Water all the way across, some three miles, from 6 inches to 2 feet. I saw no channel in crossing there. (Vol. 4, fols. 426–7 and 431.)

Pat Murray, although he went across at this point, is not questioned as to what he saw.

So, we have one witness (Reading), the one who led on this trip, who finds a slough, wades into it and then backs out, and all the others who follow in his footsteps finding no slough. He also finds a channel at Round Corral, which extended to the point a mile south, where the crossing was made. No other witness saw this slough.

SECOND CROSSING.

Northeast of Dover's.

It must have been through Sections 25 and 35, T. 28 S., R. 22 E., where the witnesses had crossed before.

THORNTON

Says: Saw no water; saw ponds on one side, but no channels or sloughs. Returned on nearly the same trail, and saw no slough or channel.

READING

Is indefinite. Saw a depression 6 inches deep, but did not go around it; the country was level; came out about 1½ miles north of Dovers. (Vol. 4, fols. 637–8.)

MCCLUNG

Saw no channel in crossing, nothing, except lakes. (Vol. 4, fol. 437.)

Saw no channel returning. (Vol. 4, fol, 441.)

MCLEAN

Saw nothing that he would recognize as a slough. (Vol. 4, fol. 1521.)

Neither Taylor or Murray are questioned about this crossing. No slough found or seen by any of the witnesses. Still this crossing was through Sections 25 and 35, T. 28 S., R. 22 E., where Schuyler found the slough and followed it, for a mile.

The

THIRD CROSSING

Or attempted crossing was at Will's Hog Ranch, which we have heretofore referred to.

The first party making these crossings, crossed the body of swamp and overflowed land at five different points.

The second party at six different points. But the first crossing made by the first party and the third crossing made by the second party was at the same point. And the fifth crossing by the first party, was at the same point as the sixth crossing by the second party.

The third party crossed at three different points, both the third crossing made by the third party was the same as the fifth crossing by the first party, and the sixth crossing by the second party.

So in fact the body of swamp land was crossed but at seven different points, and they were:

1st. Across Section 19, T. 25 S., R. 22 E., and Sections 23 and 24, T. 25 S., R. 21 E.

2d. From the Tule House across Section 32, T. 25 S., R. 22 E. Section 6, T. 26 S., R. 22 E., and Sections 1 and 12, T. 26 S., R. 21 E.

3d. Across Sections 31, 32 and 33, T. 26 S., R. 22 E.

4th. Across Sections 8 and 9, T. 27 S., R. 22 E.

5th. Across Sections 9 and 10, T. 28 S., R. 22 E.

6th. Across Sections 25 and 35, T. 28 S., R. 22 E.

7th. Across Sections 7, 8, 9 and 10, T. 29 S., R. 23 E.

At the second crossing all testify to finding three sloughs, one on the east and one on the west side, and a slough connecting the two.

And at every other crossing some of the witnesses found sloughs.

But admitting that at six crossings, no sloughs or channels were found, then we have the existence of a slough or channel established by plaintiffs for upwards of 50 miles long, which is shown by defendants witnesses, not to exist at six different points and for a few yards at each point. Admitting such breaks did in fact occur, and at all such points the water ran over the surface of the swamp and overflowed land, still the findings are contrary to, and not justified by the evidence, and plaintiffs must recover, as such facts would not destroy the character of Buena Vista Slough, as a natural watercourse.

Macomber v. *Godfrey*, 108 Mass. 219;
Gillett v. *Johnson*, 30 Conn., 180.

Level lines run by Fillebrown and Macmurdo from southeast corner of Section 28, T. 29 S., R. 24 E, and through Sections 7, 8, 9, 10, T. 29 S., R. 23 E.

We will now call attention to the level lines run by Fillebrown and Macmurdo in the attempt to break the continuity of Buena Vista Slough.

The line run from the southeast corner of Section 28, T. 29 S., R. 24 E., ran through Buena Vista Slough, striking it at stations Numbers 105 and 106, where the notes of Fillebrown and Macmurdo show that it was well defined, over 100 feet wide, and over four feet deep with water running in it (north), 2.9 feet deep, and this was on Section 4, T. 30 S., R. 24 E., and at a point where Macmurdo testified the slough was not so well defined as at other points. So this level line does not aid defendant.

We will call special attention to a portion of Fillebrown's testimony in relation to the width of Buena Vista Slough, where it was crossed on this survey, to show how persistently he tries to narrow down every slough, or channel that he comes to in this body of swamp and overflowed land.

He says Station 105 was just at the edge of the water at Buena Vista Slough, water 2 feet deep. Station 106 was in the Slough near the left (west) bank, and a foot or two from where they took a position on the west bank. He is asked how wide the slough is at that point, and he says: Stations 105 and 106 were just 100 feet apart, but as our line crossed the slough "a little diagonally," the slough would be about 60 feet wide. (Vol. 4, fols. 303-6.) If the line where they crossed the slough was but 100 feet long and the slough 60 feet wide, the "little diagonally," would have to be on an angle of about 53 degrees, while the maps in

evidence put in by both plaintiffs and defendant (B and I), show that the slough was crossed at nearly a right angle.

Level line through Sections 7, 8, 9 and 10, T. 29 S., R. 23 E.

The other level line ran through Sections 7, 8, 9 and 10, T. 29 S., R. 23 E., and to the centre of a Section 12, T. 29 S., R. 22 E., and was not run in such a manner as to entitle it to any consideration or weight as evidence, and besides, it affirmatively appears that the line crossed at least two channels or sloughs, and they are noted as such by the surveyors when they were in the field doing the work.

The first note is:

"Station 98. 877 revolutions on the slough; about "1.5 deep; runs out in 2 or 300." (Vol. 4, fol. 1334.)

The second note is opposite Station 124:

"On east bank of long stagnant slough about four "feet deep; water one foot; points running south "around end of slough." (Vol. 4, fol. 1341.)

At that time they evidently did not understand the importance of finding only "ponds," in making these crossings, and no sloughs.

Here were two surveyors put in the field with assistants, to run a line across this body of swamp land, so that a profile of the level line could be produced and used in Court to show the exact condition of this country for four miles across Sections 7, 8, 9 and 10, T. 29 S., R. 23 E.

The profile is produced and both Fillebrown and Macmurdo swear that it correctly shows the elevations and depressions of the line across such sections. That the stations are in every case just 100 feet apart, and at each station is given the correct elevation. Is this true? We say it is not, and that no reliance can be

placed on the profile or on the testimony of Fillebrown and Macmurdo, given by them in relation to that survey, and for the following reasons:

a. It affirmatively appears that the distance between the stations were not measured off in such a manner as to be all reliable. It affirmatively appears that the stations are more than 100 feet from each other, and not at regular distances apart.

Macmurdo says he stepped off the distance, checking with the wagon wheel, thus proving the correctness of his measurements.

Let us see what the evidence on this point is.

Dixon says he gave him the revolutions of the wheel first where they lunched, and that it was noted down at the time, and again at the end of four miles.

At station 98, we find the first note made "877 revolutions," etc.

He says 400 revolutions made a mile; 1600 revolutions 4 miles. If so, the wheel was $13\frac{1}{5}$ feet in circumference ($5280 \div 400 = 13\frac{1}{5}$.)

$877 \times 13\frac{1}{5}$	$= 11{,}576\frac{2}{5}$ feet
98 stations of 100 feet each	9,800
Difference or error	$1{,}776\frac{2}{5}$ feet

So at this point Mr. Macmurdo in going about half way across was out of his reckoning some more than a third of a mile. The measurement taken by the wagon wheel shows that they had run $11{,}576\frac{2}{5}$ feet from the starting point and had only made 98 stations. So the stations must have been $11{,}576\frac{2}{5} \div 98 = 118\frac{1}{3}$ feet apart, and not 100 feet as claimed by Fillebrown and Macmurdo.

Macmurdo says the "pond" was between Stations 124 and 125 (Vol. 4, fol.

1109), that the distance from the center of Section 12 to the pond was ..... 9,656 feet
and the pond was from the starting point .. 12,500 feet

Whole distance ..... 22,156 feet
(Vol. 4, fol. 1347).

While Fillebrown says the "pond" was between Stations 114 and 115 (Vol. 4, fol. 275), that it was from the starting point
about ..... 11,500 feet
from center Section 12 about .... 10,000 feet

21,500 feet

(Vol. 4, fol. 338).

While the distance would be if we place the stations 100 feet apart:
211 stations of 100 feet each ..... 21,100 feet
from 211th station to center of Section 12, 16 chains ..... 1,056 feet

22,156 feet

(Vol. 4, fol. 1314),

the same as given by Macmurdo, but 656 feet greater than given by Fillebrown, and Fillebrown fixes the pond 1000 feet west of where Macmurdo says it is.

F. P. McCray, Seth Smith, George Smith and E. T. Wright, all surveyors, measured the distance across at the same point with a steel chain, and give the distance:

In a straight line, 4 miles .... 21,120 feet
from end of 4 miles to center of Section 12. 2,747 feet

23,867 feet

Measurement of Macmurdo and Fillebrown ..... 22,156 feet

Excess of McCray's and others measurement 1,711 feet

This measurement of McCray and others agrees very closely with that we find in map "B" made in 1878.

The distance as per that map is 363 chains or 23,958 feet.

McCray and others, by exact measurement, fix the pond or slough at Station 132, or from the starting point, 13,200 feet. If Macmurdo is correct and they had gone 124 stations when they came to the pond, then each station represented

$$13{,}200 \div 124 = 106\tfrac{1}{2} \text{ feet.}$$

If Fillebrown is correct and the pond is on Station 114, then each station represented

$$13{,}200 \div 114 = 116 \text{ feet.}$$

Still Macmurdo says, he can step off a mile and only come out five paces (fifteen feet), out of the way. Can any weight be given to this evidence of Macmurdo and Fillebrown as to the several profiles made by them, no two of which are alike, although they are made from the same notes. They started in, intending to deceive the Court as to the true condition of the country across where they ran the line. Instead of giving a correct profile, they ran 31 stations to get around a slough, and said nothing about it until we drew it out of them on cross-examination, and even then Macmurdo testifies that he found no depression south of the pond, although his notes show that although he ran one fourth of a mile up the slough, in his efforts to head it off, and get around it, he finds three depressions, two of them two feet and one inch, and one, two feet and four inches, and these depressions, it must be borne in mind, are found after he has run up stream 1,300 feet in a country where the fall is from four to five feet per mile. Still this witness testifies that he found no depression south of the pond through which the water could run into it, and that he found no depression lower than the station at the edge of the pond. (Vol.

4, fol. 1295.) He continues and gives the elevation of Station 125 on the west bank of the slough as 94.3, and gives the elevations of the 29 stations that were made in going around the pond "each station represented 100 feet," and all of them are lower than Station 125. (Vol. 4, fols. 1297–8–9 and 1300.)

The witness then gives at length his manner of running level lines to obtain a profile or vertical section of a country. (Vol. 4, fol. 1303 to 1307.) He then testifies that the Profile Exhibt L, is not correct, although he and Fillebrown had sworn it was correct. (Vol. 4, fol. 1308–9.)

And this is the manner in which the defendant would *demonstrate* that there is no water-course or slough or channel crossing Sections 7, 8, 9 or 10, T. 29 S., R. 23 E. The whole survey and platting of the notes of such survey was a cheat and a fraud, and the testimony both of Macmurdo and Fillebrown proved such to be the fact. These surveyors never intended to give to the Court a correct statement of what they found on that survey, and they deliberately prepared, to be used in evidence, a profile which they knew did not truthfully represent the line they had run across that body of swamp land.

What weight can be given to the evidence of such witnesses or to their work, when it affirmatively appears that they are not only willing to misrepresent things to the Court, but to prostitute their professional standing to aid an employer to win in a desperate case.

They both testify falsely as to their reason for selecting the starting point and line for the survey, and from the time the post was driven at the initial point of the survey until they left the stand as witnesses, every step and measurement taken by them, and all the testimony given by them, was with the deliberate intent of

deceiving the Court as to the true condition of the country through which they were running a level line.

A fitting and closing chapter of this evidence will be found on pages 338, 348–9 and 352–3–4 and 5, Vol. 4, where Macmurdo of his own motion makes a diagram to show where the pond or slough would fall on Section 8, produces it, and hand's it to plaintiff's counsel with his calculation on it, and the pond or slough delineated on it.

But on re-direct examination by plaintiff's counsel the witness swears that this diagram is, although made by himself, all wrong and really represents nothing.

In other words it has to share the fate of every other map and profile made by this witness where they show anything that is injurious to the defendant's case.

Evidence in Rebuttal, Relating to the Level Line, Across Secs. 7, 8, 9 and 10, Tp. 29 S., R. 23 E.

In rebuttal the plaintiffs called four witnesses, all surveyors, who testified in relation to a cross section or level line run by them over the same line run by Macmurdo and Fillebrown, and a profile showing the level line, as run by them, was introduced in evidence. (Exhibit 41.) They started from the stame same stake Macmurdo and Fillebrown had started from. (Vol.5, fol. 16; fols. 174–5; fols. 82–3), ran four miles on the same line that Macmurdo and Fillebrown did, and then direct to the centre of Section 12, Township 29 South, Range 22 east, the terminal point of Macmurdo and Fillebrown's survey.

G. W. Smith,

Ex-County Surveyor of Tulare County, testified that they measured the stations with a 100 foot chain. (Vol. 5, fols. 10 and 15.) (This chain or steel tape is in evidence, Exhibit 100, Vol. 5, fol. 663.) And then is

given the elevation of each station and also of plus stations up to 211+20, or 4 miles. Then the distance from Station 211+20 to the centre of Section 12, and also the elevation of centre of Section 12. (Fols. 17–31.) The distance was 2,747 feet and elevation 92.15.

They found a pond or slough between Stations 132 and 133.

E. T. WRIGHT,

County Surveyor of Los Angeles County, a surveyor for ten or eleven years, testified to the same facts, giving stations and elevations for four miles in a straight line along the drag line made by Macmurdo and Fillebrown, and then 2747 feet to the centre of Section 12.

He locates a lake, or pond, south of Station 132, and that in measuring the distance between the stations they used a steel tape or chain, 100 feet long. (Vol. 5, fol. 112.)

This chain or steel tape is in evidence. "Exhibit 100."

SETH SMITH,

County Surveyor of Tulare County, for 13 years engaged in surveying as an occuption, also testified to the same facts, giving distance across the swamp land as 211+20 stations and 2747 feet from the last station to centre of Section 12, and says profile Exhibit 41 is correct, and fixes the pond at Station 132. (Vol. 5, fol. 122.)

F. P. MCCRAY

Testified to the same facts. That they ran a straight line four miles, making 100 feet stations, measured with an engineer's chain. They ran to the centre of Section 12, Township 29 south, Range 22 east, 2747 feet. That he found a pond south of Station 132. (Vol. 5, fol. 135.)

The appellants claim that it clearly appears from the foregoing testimony, that there is a continuous channel or slough from Buena Vista Lake to Tulare Lake; that the testimony offered by defendants does not make a substantial conflict of testimony on such point, or in fact any conflict, and that all of the findings to the effect that there is not a continuous water-course or channel from Buena Vista Lake to Tulare Lake, are contrary to, and not justified by the evidence.

The witnesses of plaintiffs were parties who had been along Buena Vista Slough with stock for years; many of them residing on its banks. They were the only class of men who could in the nature of things know much about the country through which Buena Vista Slough ran, as they were the only class of people who were along and over it at all stages of water. They show a familiarity with the water courses that could only be acquired by men who depended upon them for water for their stock, and who had always to be on their guard, in crossing them when full of water. Self-interest and self-preservation were ever serving to impress upon them the physical features of this country.

Nearly every one of the witnesses of plaintiffs are men entirely disconnected of any interest in the suit, and in no manner connected with the plaintiffs.

Plaintiffs' witnesses of this class were:

R. B. Still,

Who was on Buena Vista Slough from 1874, to the time of the trial, except the single year of 1876.

F. A. Tracy,

A stock-raiser, resided on Buena Vista Slough from 1863 to 1874, and on Goose Lake Slough from 1874 to 1878, and had cattle along Buena Vista Slough, from Buena Vista Lake to Tulare Lake, all those years.

J. M. Lewis,

Was on Buena Vista Slough in 1862, 1863, 1866, 1871, 1876, 1877, 1878, 1879 and 1880, always working with stock, and from Buena Vista Lake to Tulare Lake.

Thomas L. Briggs,

Was on Buena Vista Slough from Buena Vista Lake to Tulare Lake in 1864, 1865, 1866, 1874, 1875, 1876, 1877, 1878, 1880, 1881, always working with cattle.

C. W. Clarke,

(Of Cox & Clarke), has been in the cattle business since 1851. Was on Buena Vista Slough in 1865, 1866, 1867, 1868, 1869, 1873, 1874, 1875, 1876, and has had cattle on Buena Vista Slough ever since 1865, owning a large tract of swamp land on the slough.

W. Canfield,

A stock-raiser, with F. A. Tracy, and lived on Buena Vista Slough with him from 1864 to 1874, and since then on Section 34, Township 30 south, Range 26 east, and near Buena Vista Slough, and has had cattle on Buena Vista Slough during all those years.

George Racine,

A stock-raiser, was on Buena Vista Slough from Buena Vista Lake, to Tulare Lake in 1859, 1864, 1865, 1867, 1868, 1869, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1879, 1880 and 1881, always with cattle.

Jesse Dover,

A hog raiser, lived on Buena Vista Slough, on Section 1, Township 29 south, Range 22 east, from July 1876, to the date of the trial, running his hogs along Buena Vista Slough, north 14 miles, south 7 or 8 miles.

JERRY PENSINGER,

Was on Buena Vista Slough in 1872, and crossing it every year from 1874 to 1878.

M. ROGERS,

Was on Buena Vista Slough in 1858, hunting and with cattle in 1863, 1864, 1865, 1866, 1867, 1874, 1878, 1880 and 1881.

T. W. BARNES,

Was raising hogs on Buena Vista Slough during the years 1863, 1864, 1865, 1866, 1867, 1868, 1869, working from Buena Vista Slough to Goose Lake. Then in 1870, 1871, 1872, 1873, 1874, 1876, 1877, 1878 and 1879. The first years with hogs and cattle, the later years working for Wible.

MILTON NORTON,

Resided on Buena Vista Slough, on Section 15, Township 30 south, Range 24 east, and has ever since 1878, and engaged in raising hogs on Buena Vista Slough, and farming on Section 10, and runs his hogs from Wible's camp, down to the lower end of Weed Island, three-quarters of a mile below Bonestell's. Was also on the slough in 1875, 1876, 1877.

ROBERT BURGAN,

Worked for plaintiff Crocker, with cattle on Buena Vista Slough, in 1875, 1876, 1879, 1880.

S. W. WIBLE,

Lives on Section 15, Township 30 south, Range 24 east, Wible's head-quarters, since the fall of 1876, and has been on Buena Vista Slough ever since.

F. M. EPPERLY,

Came to the slough in 1871, and lived on it at Dover's hog camp until May 1876, raising hogs, running them between the lower end of Weed Island and down to a

point 8 miles below his camp. Returned to Buena Vista Slough in 1877 and worked for Crocker. In the fall of 1878, located near the Tule House, and remained there raising hogs until April, 1880, working hogs from the Tule House to the Adobe Holes. In April 1880, he went back to Dover's Camp, and is still there raising hogs.

ALEXIS GODEY,

First saw Buena Vista Slough in 1858, and from that time on to 1868.

ELISHA STEVENS,

Was hunting, trapping and fishing on Buena Vista Slough and Kern River, and Kern and Buena Vista Lakes, off and on, from 1845, to 1869.

W. W. HUDSON,

Was chief herder of the United States Government from 1859 to 1872 or 3, and driving cattle each year along Buena Vista Slough from Buena Vista Lake to Tulare Lake.

SOLOMON JEWETT,

Was on Buena Vista Slough in 1862, 1863, 1864 and 1865.

JOHN BARKER,

Was on Buena Vista Slough from Buena Vista Lake to Tulare Lake. In 1854, hunting. In 1856 and 1857, examining the slough to see if there was a continuous channel to Tulare Lake. In 1858–9, followed Buena Vista Slough from Buena Vista Lake to Tulare Lake.

C. D. GIBBES.

Deputy United States Surveyor, surveyed portions of the land in 1854, and finds Buena Vista Slough located the same as on McCray's map.

J. C. Crocker,

One of the plaintiffs, first visited the slough in 1854, and again in 1855, and in 1868; again in 1869, and has been raising cattle, and engaged in the stock business on such slough ever since. Plaintiffs purchased 14,000 acres of land on the slough in 1870, and have occupied it ever since for grazing purposes.

We have not attempted to give a synopsis of his testimony. It will be found in Vol. 2, Trans., p. 118 to 190 and contains a clear and full statement of an experience of eleven years on Buena Vista Slough and on the land in suit, raising cattle, and a clear and minute description of the channels from Buena Vista Lake to Tulare Lake, and also of the flow and volume of water in Buena Vista Slough, during several years from 1869, to the trial of this case in 1881.

F. P. McCray,

Surveyor, who has meandered Buena Vista Slough from Buena Vista Lake to Section 24, Township 29 south, Range 23 east, and surveyed and platted it all the way to Tulare Lake.

Of these twenty-three witnesses, James C. Crocker is one of the plaintiffs; S. W. Wible is an employee of the Kern Valley Water Company, in which the plaintiffs are interested; Robert Burgan worked for Mr. Crocker at one time; Norton and Epperly have been lessees of the plaintiffs. None of the remainder of these twenty-three witnesses have had any relations with plaintiffs. Some of plaintiffs' witnesses, such as Dover, Barnes, Epperly, Norton, Tracy and Canfield, are men who have lived in the swamp district and on Buena Vista Slough for years, and some of them are living there still. Dover has lived there five years. Barnes has had his hogs ranging there since 1864, and has them there still. Norton has lived there for five

years, and Epperly has lived there for eight years. These hog raisers have to be with their hogs every day, to follow them wherever they may go, in order to keep them tame. In doing this, they necessarily have to traverse the swamp, to be continually along the banks of the slough; they are thoroughly familiar with every part of the swamp district, within the range of their hogs. Tracy and Canfield resided on the bank of the slough from 1863 to 1874, and within three miles of the slough, from 1874 to 1878.

In addition we have the maps made by McCray and by James and Macmurdo, from actual surveys, showing a water channel down to Sec. 24, Tp. 29 S., R. 23 E., and the diagram made by McCray, showing the channels all the way to Tulare Lake.

To meet this mass of evidence produced by plaintiffs as to the existence, continuity and character of Buena Vista Slough, what testimony do the defendants produce?

1st. Three surveyors, who are in their employ, and who have been in their employ for years, James, Fillebrown and Macmurdo. None of these three surveyors have ever been through this swamp district—below Section 24, Tp. 29 S., R. 23 E.—(except one crossing by James in 1871), before the year 1881. Then they visited the swamp district for the purpose of qualifying themselves to testify in this case.

2d. Another set of witnesses produced by the defendants are: M. F. Talyor, R. L. Dixon, L. Crusoe, W. McFarland, F. B. McClung, G. F. Thornton, D. G. McLean, C. G. Jackson and H. A. Reading, The last named nine witnesses are all employees of Haggin & Carr, have never had any knowledge of this swamp district or of Buena Vista Slough, before this suit, and who, in April and May, 1881, crossed the swamp dis-

trict, in order to make themselves witnesses in this case.

It is familiar experience in Courts of Justice, that the employees of the one side always contradict the employees of the other. In railroad accidents, the railroad employees, as a rule, swear to all care, and all skill and all diligence, on the part of the railroad company.

In collisions at sea, the officers and crew of one ship tell a story precisely the reverse of the officers and crew of the other vessel.

The Great Republic, 23 Wall., 29.

And this difference of statement may take place where the witnesses are of undoubted character.

" The late Mr. John Sargeant once illustrated this, " by relating a collision case that was tried when he " was a young man, the two colliding ships being filled " with lawyers who were going from Philadelphia to " Wilmington to attend Court. Which was the ag- " gressor? was the question to be tried in the colli- " sion case; and on this question each lawyer swore " with his ship."

1 Wharton's Evidence, § 404.

The same rule prevails in riot cases, the witnesses of each faction swear together.

" In riots, also, in which the responsibility of two " warring factions is involved, it is notorious that the " witnesses belonging to each faction *swear together*, " even in respect to issues as to which it is impossible " to give credit to the one body of witnesses without " imputing perjury to the other body. Party spirit, " to ascend to a higher line of illustration, makes us " unwilling to see, and *a fortiori*, unwilling to relate " that which is disadvantageous to those to whom we

"are attached; and even if our perceptions are not "thus affected, between a willing and an unwilling "witness the practical difference is great."

1 Wharton's Evidence, § 419.

Why is it that it is the rule of most Courts, that a lawyer shall not be permitted to testify as a witness, and also to address the jury?

Because it is not considered proper that one who is so warmly enlisted for one party should be a witness.

Messrs. Haggin & Carr get a large number of their employees, their superintendents of ranchos and of canals, their head carpenter, their clerk, to make visits just before or during this trial, into the swamp district, and then to express their opinion as witnesses as to there being a well defined slough through the swamp. All these employees are warmly enlisted for their employers. They appreciate how important is this water question to Haggin & Carr, and to Haggin & Carr's desert land speculation. Their very employment, their salary, their interest, may be dependent upon the result of this suit. They are deeply interested adversely to the plaintiffs. They are eager that Haggin & Carr should win. They do not want to find Buena Vista Slough with a well defined channel. These are the predispositions with which they enter upon their expeditions through the swamp district, which are to qualify them to be witnesses.

3d. *It is wonderful what effect the predisposition of a witness has upon his testimony.*

The wish becomes father to the thought and utterance of the witness.

Lady Tichborne was so anxious, so predisposed to find her son Roger, that she recognizes her son in the imposter, Arthur Orton.

When the members of the great firm of Overend, Gurney & Co. were indicted in England for a conspiracy to defraud, the shareholders appointed an accountant, who examined all their books, and thereupon stated that their business was not profitable, and that there was a deficiency in the assets of the firm of £2,000,000.

Trial Overend, Gurney & Co., pp. 125, 126.

The Court appointed an official accountant, who declared that the business was profitable, and that the profits might be fairly estimated at £190,000 a year.

Same trial, p. 231.

Here were two accountants dealing with figures, each examining the same books. The predisposition and partizan feeling of the shareholders' accountant (the prosecutors' accountant), was such, that he found no profit in the business. The official liquidator estimated the profits at £190,000 a year.

4th. *This party of Haggin henchmen not only started on this expedition with the strong partizan feeling of employees, but they started out to get up testimony for this case.*

They started out with the idea of finding, if possible, facts for the benefit of their employers. That is another serious objection to the correctness of their testimony. The condition of this swamp, the character of the channel of Buena Vista Slough, did not come to their knowledge in the course of their respective employments. They never lived in the swamp, or had business in the swamp, or crossed the swamp in hunting or in traveling. They went to the swamp district to see if they could there find some testimony for Haggin & Carr. They were not searchers after truth. They were hunters for Haggin's side of the case.

A stranger sent into a community to learn the character of a witness, is not competent to testify as to such character.

1 Wharton's Evidence, § 563;
Douglass v. *Tousey*, 2 Wend., 354.

5th. *Besides, when these employees made most of their excursions into the swamp district, there was no water running in Buena Vista Slough.*

It is very difficult for an observer, a casual observer, to tell how water will flow; whither it will run; where it will find sufficient depression for a continuous stream; how far it will spread out before it continues on in a single channel.

W. R. Macmurdo describes the difficulty of locating or surveying Buena Vista Slough, when there is no water in it.

If a surveyor experiences this difficulty, how much more difficult for men not surveyors, to make accurate observations as to the channel of the slough.

The mode in which these Haggin hunters explored the swamp district so as to find a continuous slough is well illustrated by the testimony of the boy Thomas L. Will. That testimony is to be found in Transcript, Vol. 5, fols. 206–220.

The substance of this boy's testimony is as follows:

(a) He gives the names of each of the six who composed this exploring expedition, namely: McClung, Thornton, Taylor, McLean, Murray and Reading.

(b) Their proposed object is to explore the swamp district and ascertain if Buena Vista Slough runs through it with a continuous channel. They take this boy (Will) as a guide. They go a mile into the swamp district and they come to a large slough.

(c) The boy is ahead of the Haggin party, some thirty yards ahead; he is on horseback, and he plunges into this large slough, and in crossing it is almost compelled to swim his horse.

(d) Upon this Col. McClung, according to the boy, said to Dr. Thornton: "*I had rather turn back.*" Then there was some talk among the party, and in the language of the boy "*they made it up.*" They said, "*they had rather turn back.*" Of course they had rather turn back. They had found something they were not looking for. They had found something they did not wish to find. They had come to the Rubicon of Haggin & Carr's fate, and when they thought of the serious consequences to their employers of their plunging in and crossing that swollen and almost swimming slough, they paused upon the brink.

This expedition took place according to the witness Thornton, on the 14th of May. (Vol. 4, fol. 589.)

MR. THORNTON,

In describing the third day of this expedition, says:

"After coming back to the easterly side of the "slough this second time, we came down the body of "swamp land, and stopped at Will's Camp; he had "hogs in the tules. Then we went to examine that "swamp land there, and we attempted to go into the "tules again, and it was so boggy, the water having "just got on to it, so that we could not go in with a "team, and we came back again and went to the out-"side, on the border of the swamp land, and came "home—returned." (Vol. 4, fol. 601.)

(a) Not one word about the guide.

(b) Not one word about striking a large and almost swimming slough.

(c) Not one word about the guide's crossing the slough in their presence and sight.

(d) Not one word about having gone a mile into the swamp.

On the contrary, Thornton speaks of having found it boggy, just as they entered the tules.

(e) Strange that they had successfully gone with their buggies through one mile of the swamp, and only found it boggy when they came to the brink of this big slough.

F. B. McClung,

In speaking of this expedition, says, on the third day, Tuesday, May 17th, they went to Will's hog camp, on Broder Island, on the east side of the swamp. (Vol. 4, fols. 441 and 463.)

"At Will's hog camp we drove into the tules, and " got tangled and bogged up in the water, and we got out—found our way out.

" Q—How was the water when you drove into it by " this hog camp ?

" A—Well, the water was spread out over the tules, " and we could not tell a great deal about it." (Vol. 4, fol. 441.)

(a) Not one word about the guide.

(b) Not one word about striking a large and almost swimming slough.

(c) Not one word about the guide's crossing the slough in their presence and sight.

(d) Not one word about finding it boggy just as they got to the brink of the slough.

(e) Was Mr. McClung giving a correct description of what he saw when he drove into the swamp by Will's hog camp, in saying: " Well, the water was spread

" out over the tules, and we could not tell a great deal " about it?" Was the water *spread out* altogether over the tules, when it was collected and flowing in a big slough which was almost swimming?

Mr. McClung used an expression which is quite characteristic of his own testimony. He says: "At Will's " hog camp we drove into the tules, *and got tangled and bogged up* in the water, and we got out." (Vol. 4, fol. 441.)

" Tangled and bogged up"—yes, we should say so—very much tangled and very much bogged up.

D. G. McLean

Testified: "Q—Did you make any other attempt to " cross on that trip?

"A—We attempted to drive in.

" Q—Where?

"A—I believe it is at the upper or south end of " what was called Broder Island.

" Q—How far did you drive in there?

" I think we drove in but a short distance. It was " very boggy. * * * I think we went nearly a " quarter or a half a mile in there, and then turned " and went out again into the margin." (Vol. 4, fol. 1569–70.)

(a) Nothing as to the guide.

(b) Nothing about striking a large and nearly swimming slough.

(c) Nothing about the guide's crossing this slough in their presence.

(d) Nothing about their turning back just as they reached the brink of the slough.

Col. Taylor and Pat. Murray, although members of this party, were not questioned as to the results of the

observations made by them on this expedition, and this attempted crossing was being made across Sections 7, 8, 9 and 10, Tp. 29 S., R. 23 E., when so many of defendant's witnesses had crossed before and found no slough.

Nearly all the witnesses for defendants were employees of Haggin & Carr, and visited the swamp district to qualify themselves as witnesses in this case.

WALTER JAMES.

"Q—What was your purpose in going down there "on that slough on the 22d, 23d and 24th of April, "1881?

"A—To get information in regard to that country.

"Q—To be used on this trial?

"A—Yes, sir.

* * * * *

"Q—Was it to get information as a witness in this "cause, that you went down there?

"A—Yes, sir.

"Q—Who were you employed by?

"A—Haggin & Carr.

"Q—How long have you been in their employment?

"A—Since 1874.

"Q—All the time?

"A—Pretty much all the time; and I am still em- "ployed by them." (Vol. 3, fol. 293-5.)

M. F. TAYLOR.

"Q—I understand that you were never across these "swamp lands until you made this first trip?

"A—No, sir. * * *

"Q—Did you go down there to prepare yourself to "be a witness in this case?

"A—Yes, sir; I went down there expecting to be a "witness, and I wanted to see how the country ap- "peared. * * *

"Q—Whose employment are you in?

"A—Mr. Haggin's; I have been in his employment "four years last February." (Vol. 3, fol. 459–61.)

R. L. Dixon

Says: "Mr. Haggin acquired Buena Vista Ranch "July 1, 1877. I have been working for Mr. Haggin "ever since that day, superintending that property for "him." (Vol. 3, fol. 567–8.)

G. F. Thornton

Testifies that he has been for some years in the employ of Mr. Haggin as superintendent of the Bellevue Ranch. (Vol. 4, fol. 607.)

Vining Barker

Testifies that he was formerly in the employ of Haggin; about a month ago completed a contract with the defendant. (Vol. 3, fol. 623–4.)

Thomas Hoke

Testifies that he is an employee of the Kern Island Canal Company, which Haggin & Carr control. (Vol. 3, fol. 877.)

C. L. Conner

Testifies that he has charge of the Livermore Ranch; is in the employment of Haggin & Carr; has been in their employment for the last two years. (Vol. 3, fol. 942.)

T. R. Fillebrown

Testifies that he has been in the employ of Haggin & Carr for the last two years and a half. (Vol. 3, fol. 968.)

J. D. SCHUYLER

Testifies that he is an employee of the State Surveyor General's office. At half a dozen visits to Kern County in 1879, stopped as a guest at Haggin & Carr's ranch—the Bellevue Ranch. (Vol. 3, fols. 1616–1617.)

Came to Bellevue Ranch April 15th, and stayed there a month before he testified in this case. (Vol. 3, fol. 1617.)

He brought from the Surveyer General's office all the original records and papers which suited Haggin & Carr. (Vol. 3, fol. 1620.)

Generally, when the plaintiffs wanted a record or a paper, he hadn't brought that with him.

S. H. ANDERSON

Testifies that he has been working for Haggin & Carr for about two years. (Vol. 3, fol. 1742.)

W. MCFARLAND

Testifies that he is in the employ of Haggin & Carr.

F. H. COLTON

Says that he is Superintendent of the Kern Island Irrigating Canal Company, which is owned by Haggin & Carr. (Vol. 4, fol. 85–6.)

S. CRUSOE

Testifies that he is in the employment of Mr. Haggin, and has been so since 1877. (Vol. 4, fol. 239.)

F. B. MCCLUNG

Say that he has been in the employment of Haggin & Carr since August, 1875. Has had charge of one of their ranchos. (Vol. 4, fol 464.)

W. R. MACMURDO

Says that he is County Surveyor of Kern County. Lives at the Bellevue Ranch, the ranch of Haggin &

Carr. Most of his time employed by them. He has been living at Haggin & Carr's ranch most of the time for six years. Nearly all the business he has done for four years, has been done for Haggin & Carr. (Vol. 4, fols. 1061, 1354–6.)

D. G. McLean

Since the fall of 1876, has been Superintendent of the Pioneer Canal Company. The majority of the stock of that company belongs to Haggin & Carr. He is still Superintendent of that company. (Vol. 4, fols. 1543, 1571.)

C. G. Jackson

In the employment of Haggin & Carr. Was employed by them about the time this suit was commenced. (Vol. 4, fol. 585–6.)

Of the various witnesses for the defendants who testified in this case, as to the swamp land district, and as to Buena Vista Slough, we have

1st. The surveyors James, Fillebrown and Macmurdo; all employees of Haggin & Carr.

2d. Thornton, Taylor, McClung, Crusoe, McFarland, McLean, Jackson and Reading, all employees of Haggin & Carr.

3d. Parties in intimate relations with Haggin & Carr; Barker and Schuyler.

The only witnesses of defendants not connected with Haggin & Carr, who have testified as to the condition of the swamp land district, and as to the character of Buena Vista Slough, are H. A. Jastro, E. D. Cross, A. Glenn, Calvin Dunlap, J. P. Murray, and E. H. Dumble.

The testimony of Jastro and Cross is confined to an account of one of the exploring expeditions across the swamp district, pending the trial.

The only witnesses of defendant who claim to have had some knowledge of the swamp district before the trial of this case, and who did not acquire their knowledge for the mere purposes of this trial, are A. Glenn, Calvin Dunlap, J. P. Murray and E. H. Dumble.

The testimony of Van Doran, Stoner and J. S. Ellis, so far as it related to the swamp district, was confined to crossing the slough, at a particular time at Weed Island.

The testimony of A. Glenn and Calvin Dunlay is very meagre, doubtful and unsatisfactory.

The testimony of E. H. Dumble was in some respects extraordinary. He swore that he had never seen the waters of Buena Vista Slough running northward; that he had always seen them at the mouth of New River running towards the lakes.

Now this statement of Dumble is contradicted by all the witnesses of plaintiffs, and numerous witnesses for the defendants; contradicted by Col. Mendell and by Prof. Davidson, from observations made by them during the progress of this trial.

IV.

In this connection we will present our objection to the 79th finding, wherein it finds that "for more than "ten years next preceding the commencement of this "action, none of said water has flowed to Tulare Lake, "save and excepting that in exceptional and rarely re-"curring years of excessive and unusual rain and snow, "a portion of said water has flowed to and into Tulare "Lake, following, however, no defined channel over "said swamp, but generally spreading throughout the "same and not constituting a water-course or regular "flowing stream."

This action was commenced May 12, 1879. (Vol. 1, fol. 73.) So the ten years referred to would be from May 12, 1869, to May 12, 1879.

What is the evidence as to the flow of water along Buena Vista Slough during such period?

It certainly will not sustain the finding.

It clearly appears that prior to the time water was first taken from Kern River for irrigation, about 1877, the flow of water along Buena Vista Slough and to Tulare Lake was as regular, and for about the same period that it flowed in Kern River. That during that time there was but one dry year, that of 1871. That year some of the witnesses testified that the water did not reach Tulare Lake; only went down as far as the Adobe Holes or Epperly's Camp, over twenty miles. But all the witnesses testify that every other year during such period, the water flowed to Tulare Lake, and for months each year, and some years it ran to Tulare Lake the whole year from January 1st to December 31.

We will commence with the year 1869, and give the witnesses who testified to finding running water in Buena Vista Slough in each year to 1879.

1869.

TRACY

Says: "It (Buena Vista Slough), did not fall into "holes at all in 1868. I don't think it did in 1869." (Vol. 2, fol. 996.)

To the same effect is

Testimony of Hudson, Vol. 2, fols. 188–9 and 193–4;

" Crocker, Vol. 2, fols. 485–9 and 544;

" Racine, Vol. 2, fol. 1241.

1870.

CROCKER

Says: "The slough was full of water in the year 1870, "whenever I went to the slough." (Vol. 2, fols. 489, 490 and 546.

To the same effect is

Testimony of Hudson, Vol. 2, fols. 188–9 and 193–4;
" Tracy, Vol. 2, fol. 936 and 996;
" Racine, Vol. 2, fol. 1242;
" Barnes, Vol. 2, fol. 1359.

1871.

EPPERLY

Moved to what is known as Dover's Camp, on Section 1, T. 29 S., R. 22 E., in May, 1871.

He says: "The slough was full of water when I "went there in 1871. I don't recollect how long it "ran there, but I think until August. (Vol. 2, fol. 2173.

"And came down again in December, 1871." (Vol. 2, fol. 2286.)

And see, also, Vol. 2, fols. 2224, 2282–4.

See, also:

Testimony of Hudson, Vol. 2, fols. 188–9, 193–4;
" Crocker, Vol. 2, fols. 490–3, 548, 569 and 574;
" Tracy, Vol. 2, fols. 936 and 996;
" Lewis, Vol. 2, fol. 1044;
" Racine, Vol. 2, fols. 1242–3;
" Barnes, Vol. 2, fols. 1330, 1359 and 1377.

All the witnesses of both plaintiffs and defendants agree in their testimony that 1871 was a dry year.

1872-3-4 and 5.

TRACY,

Who lived on the bank of the slough, says that during the years 1872–3–4 and 5 the water ran all the season through Buena Vista Slough to Tulare Lake. (Vol. 2, fols. 1022–3.) See, also, Vol. 2, fols. 939 and 997.

EPPERLY,

Who lived on the slough twenty miles lower down, says the same thing, except that the water stopped running a short time where he was in 1874. (Vol. 2, fols. 2174, 2286–7.)

The following additional witnesses testify to the same effect:

(1872) Hudson, Vol. 2, fols. 188–9, 193–4;
Crocker, Vol. 2, fols. 490–3;
Racine, Vol. 2, fol. 1243;
Pensinger, Vol. 2, fols, 1271–2;
Rogers, Vol. 2, fol. 1334;
Barnes, Vol. 2, fol. 1359.

(1873) Crocker, Vol. 2, fols. 490–3.
Clarke, Vol. 2, fol. 1159;
Racine, Vol. 2, fols. 1244–5;
Barnes, Vol. 2, fol. 1334;
Epperly, Vol. 2, fols. 2190, 2224, 2288.

(1874) Crocker, Vol. 2, fols. 490–3;
Still, Vol. 2, fols. 798–9;
Briggs, Vol. 2, fol. 1093;
Clarke, Vol. 2, fols. 1159–60;
Racine, Vol. 2, fols. 1245–6;
Pensinger, Vol. 2, fols. 1274–5;
Rogers, Vol. 2, fols. 1295–6;
Epperly, Vol 2, fol. 2289.

(1875) Crocker, Vol. 2, fols. 490–3;
Still, Vol. 2, fols. 761 and 801;
Briggs, Vol. 2, fol. 1098;
Racine, Vol. 2, fol. 1247;
Wible, Vol. 2, fol. 1753;
Epperly, Vol. 2, fol. 2290.

1876.

EPPERLY,

Who left the slough in May, says: "When I lived "there in 1876 there was plenty of water running "there." (Vol. 2, fol. 2174.)

TRACY

Says it went into holes in June or July that year and continued that way until some time in the fall. (Vol. 2, fol. 998.) And says the cause of its drying up was: "I think we were using a great deal of water that "year; that was one cause of it; using it in ditches for "irrigation above the slough." (Vol. 2, fols. 1025 and "1032–3.)

CROCKER

Is asked: "Q—When was the first time you ever "saw that slough without water running in it?

"A—In 1876 and 1877. * * *

"Q—What was the reason of there being no water "there in 1876 and 1877?

"A—Well, it was a dry year, was one cause; *and "another cause was that there had been more water taken "out of the river than in previous years.*" (Vol. 2, fols. 507–8, and 514. See also Vol. 2, fol. 593.)

The following witnesses testified as to water running in Buena Vista Slough in 1876:

Lewis, Vol. 2, fol. 1046 and 1070;
Briggs, Vol. 2, fol. 1101;
Clarke, Vol. 2, fol. 1167;

Dover, went there in July and found plenty of water; Vol. 2, fol. 1267;

Burgan, Vol. 2, fol. 1735 and 1742;

Wible, Vol. 2, 1753–4, 1811, and 1829.

1877

Was a dry year, but both Crocker and Tracy say that the reason more water did not run down Buena Vista Slough that year, was because so much was being taken from the river by the canals. (Vol. 2, fol. 1025, 1032–3, and fol. 507–8, and 514.)

And the evidence of all of the witnesses of the defendant who testified to the taking of water from Kern River for irrigation purposes, is to the effect that very little water was taken prior to 1876. Although it was a dry year and the canals were taking an increased amount, still, some water came down the Buena Vista Slough. During this year, from April to August 31, the defendant's canal was taking from Kern River a stream of water from 6 to 22 inches deep and the width of the canal at its headgate, 80 feet. (Testimony of Roberts, Vol. 2, fol. 276 to 278). And during all this time no water ran down Buena Vista Slough. But in the fore part of the year, water did run down Buena Vista Slough, and through the upper part of the swamp land. See

Testimony of Crocker, Vol. 2, fol. 507;

" Still, Vol. 2, fol. 763–4;

" Tracy, Vol. 2, fol. 998–9.

Tracy

Says that there was water enough from the mountains in 1877, had it been permitted to run down the slough, to have run down to Tulare Lake. (Vol. 2, fol. 1026.)

See also the testimony of Wible, Vol. 2, fol. 1829 and 1930.

1878.

During this year there was a large flow of water down Kern River.

Testimony of Tracy, Vol. 2, fol. 2; fols. 943 and 1000.

Water ran down Buena Vista Slough in the upper part of the swamp land, the fore part of the season.

Testimony of Crocker, Vol. 2, fol. 507.

It flowed from February to July, 1878, and then ceased.

Testimony of Wible, Vol. 2, fol. 1815;
" Lewis, Vol. 2, fol. 1048, 1079;
" Rogers, Vol. 2, fol. 1296.

And this year the same as 1876–7, the flow of water to Buena Vista Slough was reduced by reason of the water being taken out by the canals.

From July, 1878, to May 12, 1879.

The fact that no water did flow down Buena Vista Slough from July, 1878, to the date this action was commenced, May 12, 1879, was not occasioned by scarcity of water coming down Kern River, but from the fact that it was all taken out of the river by the canals.

It clearly appears from the testimony heretofore referred to, that for ten years preceding the commencement of this action, there was a running and continuous stream of water down Buena Vista Slough, with the exception of a short period during the years 1871, 1876, 1877, 1878 and the early part of 1879, and it further appears from the testimony of the witnesses, Alexis Godey, Elisha Stevens, W. W. Hudson, Solomon Jewett, John Barker, J. V. Rosemeyre, J. C.

Crocker, F. A. Tracy, J. M. Lewis, T. L. Briggs, C. W. Clarke, W. Canfield, Philo D. Jewett, M. Rogers, T. W. Barnes and C. D. Gibbes, that this same stream of water was running from Kern River into Kern Lake; thence through Buena Vista Lake and down Buena Vista Slough, or directly into and down Buena Vista Slough, from 1850 down to 1868; or, in other words, that Buena Vista Slough has always been the only outlet for the waters of Kern River.

Besides the testimony of the witnesses who were living and working on Buena Vista Slough from 1869 to 1879, as to the flow of water down that slough to Tulare Lake, we have the testimony of Mr. Wible in relation to the flow of water in Kern River, at the head of the Pioneer Canal, from January, 1875, the time he moved to his ranch near that point, down to June, 1878, and all called out by the defendant on cross-examination.

He testifies that a large volume of water was flowing past that point during January, February, March, April, May and June, 1875—a big stream, past fording. (Vol. 2, fol. 1870.)

Also July. Commenced flowing in August or September. (Vol. 2, fol. 1873.)

A good head in September, October, November and December.

In 1876, in January, February, March, April, May, June, the water was high, was falling in July. (Vol. 2, fol. 1878.) In August, gone down probably; 200 or 300 feet wide, 2 or 3 feet deep. September, 200 feet wide.

That in 1877 it continued to run until May, and then failed—that being a dry year. (Vol. 2, fol. 1886.)

In January, 1878, water was running in the river at that point, and plenty of water until June. (Vol. 2, fol. 1892.)

This point is only about 12 miles from the point on Buena Vista Slough where Kern River empties its waters.

S. M. FARMAN,

Who resided on the bank of Kern River, on Section 2, T. 30 S., R. 26 E., since 1872 (only 10 miles from where Kern River empties its waters into Buena Vista Slough, and at a point below the head of all the canals on Kern River, except that of the Joice canal), testifies: That the river at his house, Kern River, was full from bank to bank, every summer, from 1872 to 1876, and fordable after high water. (Vol. 2, fol. 2135–6.) That it was running during all those years, but went dry in 1877, a dry year, and a portion of the year 1878, no water ran by his house. That during the whole of the years 1873–4–5 and 6, the river was bank full; swimming there nearly all the time. (Vol. 2, fol. 2142.)

Then we have the testimony of all the witnesses of defendant who were called and examined in relation to the flow of water down Old and New Rivers prior to 1879, to show that during every year of the ten years prior to 1879, except a portion of 1871 and 1877, large volumes of water were passing down the channels into Buena Vista Lake and Buena Vista Slough, that could only escape down Buena Vista Slough towards Tulare Lake.

Besides, we have a finding (IX) that from the years 1867-8 to the fall of 1877, the natural flow of the waters of Kern River, was down into Old and New Rivers, and that after the fall of 1877, the natural flow was down New River into Kern and Buena Vista Lakes, and thence into Buena Vista Slough, and thence along said slough towards Tulare Lake.

We therefore say that there is not any evidence in support of this 79th finding, but on the contrary, the

most complete evidence going to show that prior to 1876, when the taking of water from Kern River began to assume large proportions, that the flow of water down Buena Vista Slough was as regular as that down Kern River and was governed, by the flow down Kern River, the source of supply.

V.

THE SEVENTH FINDING IS CONTRARY TO THE EVIDENCE AND NOT SUPPORTED BY IT.

This clearly appears by the evidence we have referred to in our attack upon the 79th finding.

It clearly appears by the evidence that all the waters that ever ran down Kern River into Kern and Buena Vista Lakes, ran out of those lakes and down Buena Vista Slough. That the water in those lakes during the dry season receded about two feet (Vol. 2, fols. 211–12), and that there was a continuous current of water through the lakes and down Buena Vista Slough until the channel of Kern River was changed in 1868, and after that time until the water was taken out by the ditches higher up on Kern River, the lakes were always full and water flowing down Buena Vista Slough, except for a very short period of each year.

VI.

THE NINTH FINDING IS NOT SUPPORTED BY THE EVIDENCE.

It appears by the evidence that the water runs down New River into Buena Vista Slough, in three channels, and that all of the water that runs into the two northerly cannels, runs directly down Buena Vista Slough, and does not go into Buena Vista and Kern Lakes at all, and that a portion only of the water running in the southerly channel, goes into those lakes. This clearly appears by the testimony of the witnesses of both plaintiffs and defendant.

COL. MENDELL,

A witness for defendant, testified he measured the water flowing in the south channel twice, and found two-thirds running into the lakes and one-third north down Buena Vista Slough.)Vol. 3, fol. 993; and fols. 1017–18–19.)

PROF. DAVIDSON,

A witness for plaintiffs, testified to the same effect. (Vol. 2, fols. 1478 to 1480.)

All of the witnesses who were examined in relation to the water that ran into Buena Vista Slough from the two northern branches of New River, testify that it ran directly north, and did not go into Buena Vista and Kern Lakes at all.

VII.

THE ELEVENTH FINDING IS BUT A REPETITION OF A PORTION OF THE NINTH.

As originally signed it found that the water that ran into Buena Vista Slough, through the middle channel of Kern River, ran north and down Buena Vista Slough.

This is the finding amended by the Judge of the Superior Court without notice to us, and made to read that such water after it reached Buena Vista Slough runs south and into Buena Vista and Kern Lakes.

Every witness who testified to having seen water running in that channel, testified that it always ran after reaching Buena Vista Slough, north and down Buena Vista Slough.

TRACY,

Who lived on or near Buena Vista Slough from 1864 to 1878; and who during all that time was with his cattle ranging from Buena Vista Lake to Tulare Lake;

testified that after 1868, the main channel of the river was what was known as New River; that it entered Buena Vista Slough in two branches, the northern branch on or about Section 32, T. 30 S., R. 25 E., and that all the water that ran down that branch ran northwest, directly down Buena Vista Slough. (Vol. 2, fol. 279.)

BARNES

Testified also that the water running into Buena Vista Slough from the north fork, ran directly down Buena Vista Slough and did not run into Buena Vista Lake at all. (Vol. 4, fols. 154–7.)

STEPHENS

Testified that a part of the water that flowed in the north channel ran into Buena Vista Lake and a part north, towards Tulare Lake. (Vol. 2, fol. 158.)

CROCKER

Testified that all the water that ran in the north channel, ran directly down Buena Vista Slough, and did not run into Buena Vista Lake at all. (Vol. 2, fol. 524–7.)

S. W. WIBLE,

Who lived on the slough, testifies that all the water that ran into Buena Vista Slough through the north and center channels, always ran north down Buena Vista Slough, and never into Buena Vista Lake. (Vol. 2, fol. 1751–5.)

WALTER JAMES,

A witness for defendant, testified that in March, 1874, he was at the mouth of this middle fork of New River, on Buena Vista Slough, and that two feet of water was running in it, and that it all flowed north down Buena Vista Slough, and that at that time there was no dam at Cole's Bridge. (Vol. 3, fol. 158–9.)

Then we have the elevations given by Macmurdo, who had run a level line up Buena Vista Slough from Wible's Headquarters, on Section 15, to Cole's Bridge, as follows:

Headgate of Kern Valley Water Co.....100 feet
Where canal leaves slough on Sec. 14.....104 "
Mouth of Gage Slough.....108 "
" " Middle Branch.....109.8 "
Just north of Cole's Bridge.....111.3 "
(Vol. 4, fol. 1191–3.)

Here the slough for a distance of 6 miles has a uniform fall of about two feet to the mile; that is, from Cole's Bridge to Headquarters'; still the Court finds that water entering Buena Vista Slough at an intermediate point, is found to run up this grade, and not down it.

WIBLE

Also testified that the elevation of Headquarters is 72½ feet higher than Tulare Lake.

PROF. DAVIDSON

Testified that the elevation of Kern and Buena Vista Lakes was about 290 feet. (Vol. 2, fol. 1481.) That the course of the water of Kern River, after it entered Buena Vista Slough, was north, northwest, down Buena Vista Slough in the direction of Tulare Lake. That the whole valley drains to the north, northwest, and into the San Joaquin River. (Vol. 2, fols. 1475–6.)

With all this testimony as to which way the water actually did run that entered Buena Vista Slough from the north branch of New River, and the levels run by their own witnesses showing it could not run any other way, still the Court finds that the water ran from this branch south, up the grade and into Buena

Vista Lake, although not a single witness testified to any such course of the water; and this is the finding that the Court of its own motion changes, the counsel for defendants having drawn it to conform to the evidence, and the Court changed it and makes it contrary to all the evidence offered in the case.

VIII.

THE FIFTEENTH FINDING IS NOT SUPPORTED BY, BUT IS CONTRARY TO THE EVIDENCE.

Here is a river carrying 2500 feet of water per second. The canal of the defendant takes from it 500 or 600 cubic feet per second, when running at its full capacity, or four feet.

Testimony of Fillebrown (Vol. 4, fol. 322.)

And Roberts testified that the canal of defendant has been taking 3.9 feet, and this under a four-inch pressure. Still this appropriation of one-fourth or one-fifth of the water in times of extreme high water, and of all in time of low water, is found not to affect the flow of water into Buena Vista Slough at any point north of where New River enters it, although it is shown that from one-third to two-fifths of the water that runs down New River, and into Buena Vista Slough, runs north down Buena Vista Slough, and through and over the lands of plaintiffs.

Again, it is shown that for the three years preceding the commencement of this suit, plaintiffs had been compelled to pump water for their cattle to drink, and that during such years the feed had almost wholly failed along Buena Vista Slough, by reason of the failure of water to flow along Buena Vista Slough, as it had done in previous years when, the defendant was not taking water from the river.

If there is any evidence to support this finding we hope counsel for defendant will point it out.

IX.

THE EIGHTEENTH FINDING IS CONTRARY TO THE EVIDENCE.

It finds that on the map, "Exhibit A," that is attached to and made a part of the findings, "are correctly and fully shown and delineated," the courses and channels of Kern River, and the slough, and Kern and Buena Vista Lakes.

The map has delineated on it the slough and channel of Kern River different from any of the maps put in evidence by defendant or plaintiffs, and there is no evidence in this case that the slough and channel of Kern River are as delineated on that map.

It is contradictory of the seventy-second finding, which find that there is no slough or water channel further down than the head-gate of the canal of the Kern Valley Water Company. On this map is delineated a channel down to Section 24, T. 29 S., R. 23 E.

X.

THE TWENTY-SECOND FINDING IS CONTRARY TO THE EVIDENCE.

We need only refer to the point made by us in our objection to the fifteenth finding.

XI.

THE TWENTY-THIRD FINDING IS CONTRARY TO THE EVIDENCE, AND IS NOT JUSTIFIED BY ANY EVIDENCE OFFERED IN THIS CASE.

a. It appears that no land irrigagted from the canal of the defendant, borders on Kern River. The first gate from which water is taken from the canal to irrigate land is one mile from Kern River. The canal for that district is cut through a high bank.

b. There is no evidence in this case, that any land in Kern County is public land and belonging to the United States of America. On the contrary the testimony of the defendant's witnesses shows that nearly all the land along Kern River, is owned by private individuals.

See the testimony of Walter James, where he gives the names of owners and parties in possession of really all the land from the head of the Calloway Canal to Buena Vista Slough, commencing on page 225 of Volume 4. James gives the ownership of nearly all the land along the canals and river.

R. L. Dixon, testified that he lives on Buena Vista Ranch. He says it includes Sections 20, 21, 28, 27 and three-fourths of Section 34, Tp. 30 S., R. 25 E. That it is all fenced. (Vol. 3. fol. 489–92.) Kern River runs through Sections 22, 27 and 34.

He further testifies that Mr. Haggin owned the ranch, and had owned it since July 1st or 2d, 1879, and that he had been in possession of it since 1875. (Vol. 3, fol. 565–69.)

S. M. Farman, testified that he owned and lived on the S. E. ¼ of Section 2, T. 30 S., R. 26 E., and that Kern River ran through his place, and that George Parrish owned a place on the river on the same section. (Vol. 2, fols. 2135 to 2140,)

XII.

THE TWENTY-FOURTH FINDING IS CONTRARY TO THE EVIDENCE.

It appears by the testimony of all the witnesses who testified to the flow of water in the latter part of 1878, and early part of 1879, that there was a large volume of water flowing in Kern River, and such water would have run down Buena Vista Slough and to plaintiffs' lands, had it not been appropriated by the defendant.

Roberts, testified that in 1878–9 the canal of the defendant was taking water from Kern River. The same amount in 1878 as in 1877; in July one foot eight inches; in August nine inches. (Vol. 2, fol. 277–8.) In 1879, still more. (Vol. 2, fol. 278), continued to turn water in the canal in February or March, and turned it out in July or Augnst. (Vol. 2, fol. 293.)

The witness E. Willow, testified that in May and June, 1879, he crossed Kern River just below the head of the defendant's canal and it was dry, and that at that time water was running in the Calloway Canal. (Vol. 2, fols. 2347 to 2353.)

XIII.

THE TWENTY-FIFTH AND TWENTY-SIXTH FINDINGS ARE LIKE THE TWENTY-FOURTH, CONTRARY TO THE EVIDENCE.

See evidence referred to in connection with the twenty-fourth finding.

XIV.

THE TWENTY-SEVENTH FINDING IS BUT A REPETITION OF THE THREE LAST FINDINGS, WITH THE EXCEPTION THAT BY THIS FINDING, IT IS FOUND THAT THE LANDS DID NOT BECOME DRY OR DETERIORATED IN VALUE BY REASON OF THE APPROPRIATION OF WATER BY THE DEFENDANT.

This finding is contrary to the evidence. See evidence referred to in connection with the twenty-fourth finding, and in addition that of the witnesses—

J. C. Crocker (Vol. 2, fols. 556, 722, and 744–5);
R. B. Still (Vol. 2, fols. 764 and 769);
J. M. Lewis (Vol. 2, fol. 2, fol. 1051),

Who testify to pumping to get water for the cattle to drink, and to cattle suffering for feed, and being removed from the land for want of feed.

XV.

THE TWENTY-EIGHTH FINDING IS CONTRARY TO THE EVIDENCE.

See reference to evidence in connection with the fifteenth finding, and also the evidence of Fillebrown, who testifies that the capacity of the Calloway Canal was 500 or 600 cubic feet per second, when running to its full capacity. (Vol. 4, fol. 322.)

And the testimony of Roberts, who testified that during 1880–1881, it was taking water to nearly its full capacity (Vol. 2, fols. 279–281); and this is under a four-inch pressure. Can 500 or 600 cubic feet of water be taken out of a river that carries from 400 to 2500 cubic feet, and not affect the flow of water down to and on the land of plaintiffs? Nor can such a quantity of water be taken from Kern River in the future, and not cause such lands to become dry and deteriorated in value, when it is found (29th finding) that such lands depend solely upon the waters of Kern River and Kern and Buena Vista Lakes, for means of irrigation.

And Crocker testifies (Vol. 2, fol. 724) that this land would become valueless if the water was taken out of Kern River above it.

Prof. Davidson testified that the land would become arid if the water was taken from the watercourses. (Vol. 2, fol. 1542.)

Again, we have an offer made by plaintiffs, of testimony that would negative this finding; *i. e.*, to show by three witnesses, Judd, Garlick and Ober, that a dam at the head of the Calloway Canal in 1879, turned all the water of Kern River into that canal, the evidence was ruled out, on the ground that such fact was admitted, and still this finding of fact to the contrary. (Vol. 5, fols. 224–5–6.)

XVI.

THE THIRTIETH AND THIRTY-FIRST FINDINGS ARE NOT SUSTAINED BY, BUT ARE BOTH CONTRARY TO THE EVIDENCE.

This clearly appears by reference to the evidence referred to in connection with the seventy-ninth finding (pp. 387 to 396, *ante*.)

XVII.

THE THIRTY-THIRD FINDING IS CLEARLY CONTRARY TO THE EVIDENCE.

The only witness who testified on the point covered by this finding, was Mr. Crocker, and his testimony is just to the contrary. (Vol. 2, fols. 734–5.)

XVIII.

THE THIRTY-FOURTH FINDING, LIKE THE THIRTY-THIRD FINDING, IS CONTRARY TO THE EVIDENCE.

Mr. Crocker was the only witness who testified to the fact found in this finding, and he testified that the plaintiffs had paid out large sums of money, assessments, to construct the canal of the Kern Valley Water Company, to control and utilize the water that ran down Kern River and Buena Vista Slough. (Vol. 2, fol. 619–628–630.) And the deed in evidence, showing that the plaintiff paid $22,663.04 for 14,000 acres of the land described in the amended complaint (Vol. 2, fol. 78); and the judgment in *People* v. *Center*, shows that they expended $38,060 on 7240 acres of the land in the amended complaint described. (Vol. 2, fols. 113 and 116.)

XIX.

THE THIRTY-FIFTH FINDING IS BUT A REPETITION OF THE TWENTY-EIGHTH FINDING, IN ANOTHER FORM, AND CONTRARY TO THE EVIDENCE GIVEN IN THIS CASE.

In addition to the evidence referred to in connection with the twenty-eighth finding, it clearly appears by the evidence of all the witnesses who have had or been working with stock on Buena Vista Slough, that the diversion of the water of Kern River has caused the land along Buena Vista Slough, to dry up, and pumping has to be resorted to every year to get drinking water for the cattle ranging on the Buena Vista Slough lands, and that large numbers of cattle have had to be moved from such lands since the water ceased to flow down Buena Vista Slough, by reason of the appropriation above.

XX.

THE THIRTY-SIXTH FINDING IS LIKE THE TWENTY-EIGHTH AND THIRTY-FIFTH, CONTRARY TO THE EVIDENCE.

Mr. Crocker testified that the scarcity of water and necessity for pumping was occasioned by the appropriation of water from Kern River (Vol. 2, fol. 507–8–9), and the witness, Tracy, testified that there would be no occasion for pumping if the water was permitted to flow down the river to Buena Vista Slough, and it clearly appears, by all the witnesses, that even in "dry years," prior to the appropriation of water, pumping did not have to be resorted to. (Vol. 2, fol. 1026.)

XXI.

THE THIRTY-SEVENTH FINDING, IN SO FAR AS IT FINDS THAT GREAT ACCUMULATION OF SNOW ONLY OCCURS IN THE SIERRA NEVADA MOUNTAINS, AND AT THE HEAD OF KERN RIVER, OCCASIONALLY, AND IN RARELY OCCURRING YEARS, AND IS NOT USUAL, IS CONTRARY TO THE EVIDENCE.

Every witness who testified to the flow of water in Kern River, refer to the *usual* spring floods occasioned by the melting snows, and but a single year is testified to when this is the exception—that of 1871.

The defendant surely introduced no evidence to justify such a finding, and the Court should have found the other way, having judicial notice of the fact that such floods are usual, and occasioned by the great accumulation of snow on the Sierra Nevadas. Not a single river that heads in such mountains but overflows its banks from the flow of water occasioned by melting shows every year.

XXII.

THE THIRTY-EIGHTH FINDING IS CONTRARY TO THE EVIDENCE.

It appears, by the testimony of Farman and Wible, that the growth of willows and other trees in the channel of Kern River, has been increased and enhanced by reason of the diversion of water from Kern River.

XXIII.

THE FORTIETH FINDING IS CONTRARY TO THE EVIDENCE.

It clearly appears, by the evidence of witnesses of both plaintiffs and defendant, that Kern and Buena Vista Lakes form a part of Kern River. That they have not been since 1868, or at all, when full, one continuous sheet of water.

All the witnesses who testified in relation to such lakes, state that they form two distinct bodies of water, with a channel connecting them.

Fillebrown makes a profile of a line across this channel, giving its width and depth. (Ex.)

And see the

Testimony of Rosemeyre (Vol. 2, fol. 369);
Testimony of W. W. Hudson (Vol. 2, fol. 1946).

Mr. Schuyler (defendant's witness) testified:

"Kern and Buena Vista Lakes are connected by a very crooked slough." (Vol. 3, fol. 1109.)

This was in February, 1879. (Vol. 3, fol. 1585–7.)

See Testimony of Elisha Stevens (Vol. 2, fol. 165.)

XXIV.

THE FORTY-THIRD FINDING, IF IT CAN BE CALLED A FINDING OF FACT, IS CONTRARY TO THE EVIDENCE.

If defendant be permitted to appropriate 500 or 600 cubic feet per second of water from Kern River, it must result in injury to plaintiffs and to their lands, and must of necessity be a constantly recurring grievance, and cannot be compensated by damages, and for such a grievance there can be no adequate remedy in a Court of law.

XXV.

FINDINGS FORTY-FIVE TO FORTY-NINE INCLUSIVE, ARE EACH AND EVERY ONE OF THEM CONTRARY TO THE EVIDENCE.

It clearly appears by the evidence of all of the defendant's witnesses, that a portion of the land of plaintiffs described in the amended complaint, borders and is situated on a natural stream and watercourse, *i. e.*, west half of Section 10 and Section 5, T. 30 S., R. 24 E.

The surveys made by the surveyors Macmurdo and James, and map (Exhibit "I,") show Buena Vista Slough running through those lands.

The testimony of Fillebrown and Cruso is to the effect that they followed this slough or channel from Wible's Headquarters to the Bonestell House, and through Sections 10 and 5; and the Court finds that Buena Vista Slough is correctly delineated on the map annexed to the findings, and marked Exhibit "A;" and this map shows a channel through the west half of Section 10, and through Section 5.

And plaintiff's witnesses, who testified to Buena Vista Slough as a watercourse, not only trace it through Sections 10 and 5, but all the way to Tulare Lake.

That it is a continuation of Kern River, clearly appears by the testimony referred to in connection with the VII Point made by us in this brief (p. 297, *ante*), to which we refer the Court.

XXVI.

THE FIFTIETH FINDING IS CONTRARY TO THE EVIDENCE.

The defendant devoted days to establish the ownership of all the land along the several canals referred to in the answer, and all this testimony went in under an objection made by plaintiffs, that it was immaterial.

Now, we have a finding that can only be based upon a presumption that arises when no evidence is offered as to ownership of land, that is, that it is public land, for no witness referred even to the land covered by this finding, as being Government land.

This finding illustrates the utter disregard paid by the Court to the evidence offered in the case, when eighty findings were signed, proposed by counsel for the successful party, and not even submitted to the counsel of the adverse party.

XXVII.

THE FIFTY-FIRST FINDING IS NOT SUPPORTED BY THE EVIDENCE.

a. There is no evidence of the posting of any such notice as is referred to in the finding, on the 4th day of May, 1875.

Certain witnesses testified to seeing a notice posted near the head of the Calloway Canal, but not one of them could state its contents, nor did one of them pretend to have seen or posted it on the 4th of May.

Maude testifies that he saw a notice May 7, but cannot state what it contained. (Vol. 3, fol. 1636.)

b. There is no proof of the recording of a copy of the posted notice within ten days after it was posted, or that it was recorded at all. The paper offered in evidence did not prove anything. (Vol. 3, fol. 1650.)

See VIII, point made in this brief (p. 35 *ante*), and authorities there cited.

XXVIII.

THERE IS NO EVIDENCE TO SUPPORT THE FIFTY-SECOND FINDING.

It does not appear that any notice was posted on Section 13, T. 27 S., R. 29 E., or that the notice referred to in the fifty-first finding was posted at all.

XXIX.

THE FIFTY-FIFTH FINDING IN SO FAR AS IT FINDS "THAT "THE SAID NOTICE OF APPROPRIATION WAS SIGNED "BY THE SAID GRANTOR OF THE DEFENDANT," IS NOT JUSTIFIED OR SUPPORTED BY THE EVIDENCE.

There is no evidence in this case that any person ever signed the notice. On the contrary it appears affirmatively that they never did sign the notice. All

the evidence we have that tends to show how the notice was signed, is the copy that was recorded, and that appears on its face not to have been signed by the grantors of defendant, but is all in one handwriting, but in whose does not appear. (Vol. 3, fol. 1649.)

XXX.

THE FIFTY-SIXTH FINDING IS CONTRARY TO THE EVIDENCE.

There is no evidence of the recording of the notice of appropriation pretended to have been made by Calloway and others.

See VIII point, made in the brief, p. 35 *ante*.

XXXI.

THE FIFTY-SEVENTH FINDING IS NOT SUPPORTED BY THE EVIDENCE.

a. It appears by the evidence that the line of the Calloway Canal was not surveyed and staked out within sixty days after the pretended notice of appropriation was posted. The line of the canal was not located until many years after May, 1875.

Macmurdo says he staked out the line of the canal in 1877. (Vol. 4, fol. 1200.)

b. It appears by the evidence that at the time of the commencement of this action the Calloway Canal was not completed to a point where it crossed Poso Creek.

Testimony of Macmurdo (Vol. 4, fol. 1205);
Testimony of Hayes (Vol. 4, fol. 1418);
Testimony of Creasy (Vol. 4, fol. 1427);
Testimony of Neal (Vol. 4, fol. 1432).

c. No witness testified as to the cost of construc-

tion of that part of the Calloway Canal, built prior to the commencement of this suit.

James testified that the whole canal cost $102,000, but he did not know what that portion constructed prior to May, 1879, cost. (Vol. 4, fol. 886–7.)

It appears by the testimony of Macmurdo, Fillebrown and James, the engineers who had charge of the canal, that nearly all the lateral or side ditches were constructed after this suit was commenced.

Carr says but 1,000 acres were irrigated from this canal in 1878. (Vol. 4, fol. 1666–8.)

XXXII.

There is no Evidence to Sustain the Sixtieth Finding.

It appears affirmatively, by the testimony of defendant's witnesses, that the first side gate from which water is taken from the Calloway Canal to irrigate land is one mile from Kern River; that at the point where the canal is taken from the river there is a "bluff," and a cut about a mile long, had to be made to get the water from the river, and that no water could be taken out of the canal for irrigating purposes until a point was reached at least a mile from Kern River.

See testimony of V. Barker (Vol. 4, fol. 615 and 616.)

XXXIII.

The Sixty-first Finding is not Sustained by the Evidence.

The testimony of defendant's witnesses is to the effect that the Calloway Canal, in 1881, was taking water from Kern River, to its full capacity, still it could irrigate but 13,000 acres of land. (Vol. 4, fol. 880.) There is no testimony to support a finding

that the water appropriated through and by such canal will be sufficient to irrigate 70,000 acres of land.

XXXIV.

THE SIXTY-SECOND FINDING IS NOT SUSTAINED BY THE EVIDENCE.

No canal company, taking water from Kern River, ever complied with the provisions of the law regulating appropriations of water in California.

We refer the Court to the VIII point, made in this brief, page 35, *ante*.

This finding is in conflict with the sixtieth finding, which finds that all the land along the several canals is public land.

XXXV.

THE SIXTY-THIRD FINDING IS NOT SUSTAINED BY THE EVIDENCE.

There is no testimony in this case to show that the plaintiffs knew anything about the Calloway Canal, or its construction, except that of J. C. Crocker, one of the plaintiffs.

He never saw the canal until a few months prior to the trial of this case, and three and a half years after it was commenced. He heard it talked about about the time it was commenced, but knew nothing about it of his own knowledge. That he may have spoken to Miller & Lux about its construction. He did not then nor does he now know its dimensions. He did not know for what purpose the water was being taken out. He never saw the record of the pretended appropriation. (Vol. 2, fol. 660 to 669.)

This evidence will not sustain the sixty-third finding, and we challenge counsel for defendant to point

out any other testimony given in this case tending to sustain any single fact stated in this finding.

XXXVI.

THE SIXTY-FOURTH FINDING IS BUT A REPETITION OF THE SIXTY-THIRD IN A MODIFIED FORM.

There is no evidence in this case to justify such a finding. On the contrary, Crocker testifies that he never knew the dimensions of the Calloway Canal, and no attempt was made to show that Miller & Lux knew its dimensions, or that any of the plaintiffs had actual knowledge of any of the other numerous facts found by this finding.

XXXVII.

THE SIXTY-FIFTH FINDING IS NOT SUSTAINED BY THE EVIDENCE.

It is but a repetition of a part of the fifth, eleventh and fortieth findings.

And we refer the Court to the evidence referred to in connection with such findings, in support of the statement that this finding is not justified by the evidence.

XXXVIII.

THE SIXTY-SIXTH FINDING IS BUT A REPETITION OF THE FORTY-FIFTH AND FORTY-SIXTH FINDINGS, AND LIKE THESE FINDINGS, IT HAS NO TESTIMONY TO SUPPORT IT, BUT IS CONTRARY TO ALL THE EVIDENCE GIVEN IN THIS CASE.

We refer the Court to the evidence referred to in connection with our attack upon the forty-fifth and forty-sixth findings.

XXXIX.

THE SIXTY-EIGHTH FINDING IS CONTRARY TO THE EVIDENCE, IN SO FAR AS IT FINDS THAT THE CANAL OF THE KERN VALLEY WATER COMPANY INTERFERES WITH THE FLOW OF THE WATER OF KERN RIVER OR BUENA VISTA SLOUGH, OR IN ANY MANNER PREVENTS ANY OR ALL OF THE WATER THAT FLOWS DOWN BUENA VISTA SLOUGH, FROM FLOWING OVER AND THROUGH THE LAND OF THE PLAINTIFFS.

It appears clearly by the testimony of Mr. Wible, the Superintendent of the Kern Valley Water Co., that all of the water that enters the canal of that Company, runs back into Buena Vista Slough. That the slough is not wholly closed, but an escape for the water is left at the point where the canal crosses Buena Vista Slough (Vol. 2, fols. 1800 and 1940), and that all of the water that passes out of the other gates or out of the extreme northern end of the canal, runs back into Buena Vista Slough, and through the lands of plaintiffs. (Vol. 2, fols. 1798 to 1806.)

XL.

THE SIXTY-NINTH FINDING IS NOT SUSTAINED BY THE EVIDENCE.

It is but a repetition of the last finding (68th), and the evidence referred to in connection with such finding, clearly shows that the finding is not justified by the evidence, there being no other evidence except that of Mr. Wible as to such facts.

XLI.

THERE IS NO EVIDENCE WHATEVER TO JUSTIFY OR SUSTAIN THE SEVENTEENTH FINDING.

XLII.

THE SEVENTY-FIRST FINDING IS BUT A REPETITION OF THE THIRD, FOURTH, FIFTH, TWELFTH, THIRTEENTH, FOURTEENTH, SIXTEENTH AND SEVENTEENTH FINDINGS, AND LIKE ALL THOSE FINDINGS (EXCEPT THAT IN ONE RESPECT IT CONTRADICTS SUCH FINDINGS), AND IS CONTRARY TO THE EVIDENCE, AND NOT SUSTAINED BY IT.

We refer the Court to the testimony referred to in our attacks upon those findings.

This finding contradicts all of the findings which we have referred to, except the third, in this: it finds that Buena Vista Slough is a water course, down to Section 24, T. 29 S., R. 23 E.

XLIII.

THE SEVENTY-SECOND FINDING CONTRADICTS THE SEVENTY-FIRST, WHICH FINDS THAT BUENA VISTA SLOUGH IS A WATER CHANNEL, AND WELL DEFINED DOWN TO BUENA VISTA SWAMP.

The finding is not sustained by the evidence, and again we refer to our reference to the evidence in our attack upon the third, fourth, fifth, twelfth, thirteenth, fourteenth, sixteenth and seventeenth findings.

XLIV.

THE SEVENTY-THIRD AND SEVENTY-FOURTH FINDINGS ARE NOT SUPPORTED BY THE EVIDENCE.

It appears by the testimony of the defendant's witnesses that the amount of water taken by defendant in the Calloway Canal, is an unusual amount and not necessary to irrigate the lands irrigated from such canal.

It appears that when this case was being tried, the Calloway Canal was taking at least 500 cubic feet of water per second under a four inch pressure from the Kern River, and irrigating but 12,000 acres.

Testimony of Roberts (Vol. 2, fols. 279 and 286.)

James testified, that 70,000 acres can be irrigated from this canal. (Vol. 4, fol. 883.) The canal was taking water in 1881, to the extent of thirty-nine fortieths of its full capacity, and only irrigating 12,000 or 13,000 acres.

It appears by the testimony of Roberts, who had charge of the Calloway Canal, that every man along the canal took whatever water he saw fit, and that the amount was in no manner regulated by any one. (Vol. 2, fol. 286.)

Roberts says that in 1878 he had in the Calloway Canal a stream of water 80 feet wide, and in April, 22 inches; in May, 2 feet and 9 inches; in June, 2 feet and 9 inches; in July, 1 foot and 8 inches; in August, 9 inches. (Vol. 2, fol. 277–8.)

An average of 25 inches per month, or more than one-half of the capacity of the canal, which James testifies will irrigate 70,000 acres of land. But Carr testifies that during this year but 1000 or 1200 acres were irrigated. (Vol. 4, fol. 1666–1668.)

In 1879 the canal was taking more water, an average of two or two and a half feet (Vol. 2, fol. 278), and only irrigated 4000 or 5000 acres. (Vol. 2, fol. 287.)

In 1880 the canal was taking an increased amount, was taking at times three feet, or three-fourths of the capacity of the canal (Vol. 2, fol. 278), and only from 7000 to 9000 acres irrigated. (Vol. 2, fol. 287.)

XLV.

THE SEVENTY-FIFTH FINDING IS NOT SUPPORTED BY THE EVIDENCE.

a. It appears by the evidence that Kern River is a perennial stream down to Buena Vista and Kern Lakes.

It appears by the evidence that prior to 1876, the year

parties commenced to appropriate water in large quantities from Kern River, that water constantly flowed from Kern River to Buena Vista and Kern Lakes, except for a short time in the spring of 1871, when T. W. Barnes turned all of the water in the river into a ditch, for irrigating purposes.

Testimony Barnes (Vol. 2, fol. 1331.)

All the witnesses of defendant who testified to the flow of water in Old River, testified that every year until the head gate was put in at its head, a large volume of water flowed down into Kern and Buena Vista Lakes.

Testimony of J. R. Watson (Vol. 3, fol. 1269);
Testimony of S. A. Burnap (Vol. 3, fol. 1287 to to 1292);
Testimony of J. Niederaur (Vol. 3, fol. 1310 to to 1315);
Testimony of R. Meacham (Vol. 3, fol. 1323);
Testimony of C. Christiansen (Vol. 3, fols. 1359–60.)

"The water receded first in New River. There used to be a larger stream in Old River than in New River. I had reason to notice this particularly."

Testimony of A. C. Maude (Vol. 3, fol. 1634).

"Old River carried water through the years 1871, 1872 and 1873."

Testimony of W. Canfield (Vol. 3, fol. 1684.)
Testimony of S. H. Anderson (Vol. 3, fols. 1732-5).

b. It appears by the evidence that since the defendant's canal commenced to appropriate a large volume of water from Kern River, that there has not been sufficient water flowing down the river and Buena Vista Slough to irrigate all the lands on Buena Vista Swamp or to supply water for useful and needful pur-

poses. On the contrary, it appears that for every year since 1876 it has been necessary for plaintiffs to run a great number of pumps to get water for them to drink, and that owing to the scarcity of feed, occasioned by the want of water in Buena Vista Slough, it has been necessary to remove many of the cattle from Buena Vista Slough.

XLVI.

THE SEVENTY-SIXTH FINDING IS NOT SUSTAINED BY THE EVIDENCE, BUT IS CONTRARY THERETO.

It appears by the evidence, that the volume of water flowing in Kern River, has been from 2500 to 389 cubic feet per second.

Testimony Mendell (Vol. 3, fol. 258);
Testimony Schuyler (Vol. 3, fol. 1106.)

The Calloway Canal takes 500 or 600 cubic feet per second, under a four-inch pressure, which is at least 1000 or 1200 feet as it flows in Kern River, or one-half the amount in times of high water, and twice the amount flowing in times of low water.

Still, this finding is that this diversion of 500 or 600 cubic feet per second under a four-inch pressure, in no manner affects this scarcity of water during irrigating season, that is, from February to July.

We have only to refer to the testimony of Davidson, Mendell and Roberts, to show that this finding is contrary to the evidence.

Roberts testified that when the trial was going on, the Calloway Canal was taking 3.9 feet of water, or nearly the full capacity of the canal (4 feet). (Vol. 2, fol, 279.)

Davidson testified that he measured the flow of water flowing down Kern River into Buena Vista Slough, during the trial of this case (April 21st); that he found

400 cubic feet per second running south into Buena Vista Lake, and 300 feet running north down Buena Vista Slough. (Vol. 2, fols. 1479–80.)

Mendell testified that he measured the water flowing from Kern River into Buena Vista Slough, on April 17th and 30th, 1881. That on the 17th, the very day Roberts testified the Calloway was carrying water to the extent of thirty-nine-fortieths of its full capacity, he found 370 feet flowing south, and 185 feet running north. On April 30th, he found 567 feet going south, and 438 feet north. (Vol. 3, fols. 1016–1019.)

At the Pioneer Bridge, a point not far below the head of the Calloway Canal, 630 feet was flowing on the day the first measurement was taken, and 1000 feet on the day the second measurement was made (Vol. 3, fol. 1027), showing that there was no perceptible loss of water in running two-thirds at least of the distance between the head of the Calloway Canal and Buena Vista Slough.

Wible testified that between these two dates, when Mendell made these measurements, he was on Buena Vista Slough, below Headquarters, where it ran through the land described in the complaint, and from 3 to 3½ feet of water was running in it. (Vol. 2, fol. 1762.)

Norton, who lived on the slough below Headquarters, testified to the same effect. (Vol. 2, fol. 1680–1.)

Here we find by the testimony of defendant's own witness, Col. Mendell, that on the 17th of April, 630 feet of water was running by the Pioneer Bridge. He finds at the same time 555 feet of water running in Buena Vista Slough, and 185 feet of such water running down Buena Vista Slough to the lands of plaintiffs.

April 30 he finds 1000 feet running at the Pioneer Bridge, an increase of 370 feet. He finds 1000 feet running in Buena Vista Slough, and 438 feet running down Buena Vista Slough and to plaintiffs' lands, an increase of 253 feet, or two-thirds of the increase of 370 feet, and this all during the irrigating season, and when the defendant's canal was taking 500 feet of water at least from Kern River. Yet the finding is that this 500 feet, under a four-inch pressure, if permitted to flow down Kern River, would not materially affect or substantially increase the amount of water reaching Buena Vista Slough, although an increase of 370 feet at the Pioneer Bridge did in fact give an increase of nearly 500 feet at Buena Vista Slough.

Again, it appears by the testimony of Roberts, that during July and August, 1878, and from February to May 12, 1879 (the day this suit was commenced) the Calloway taking from one to two and a half feet of water (Vol. 2, fol. 278), still not a drop reached Buena Vista Slough during all that time, although Wible testifies that 50 feet of water passing the Pioneer Bridge will reach Buena Vista Slough, there must have been from 125 to 300 feet running in the Calloway Canal.

If this finding can be made to stand, then figures can be made to lie.

Again it appers by the testimony of Mr. Wible (Vol. 2, fol. 1821), that the Calloway was running full of water on March 9th and 13th, 1881. This was during the irrigating season, and not a drop was going down to Buena Vista Slough. That in fact nearly all the water in the river was turned into the Calloway Canal by a wing dam, constructed across the river at its head, and Wible testifies that the head of water then running in the canal, would have run through to

Headquarters had it been turned into the river. (Vol. 2, fol. 2115). And again it appears that no water was running in the Calloway Canal, January 9 and 10, the days when Mr. Watkins took the photographs in evidence, that the water ran down to Buena Vista Slough. (Vol. 2, fol. 2116.) It is only when the Calloway is taking a large volume of water, that no water passes down to plaintiffs' lands.

XLVII.

THE SEVENTY-SEVENTH FINDING, LIKE THE SEVENTY-SIXTH, IS CONTRARY TO THE EVIDENCE, AS APPEARS BY THE LAST STATEMENT AND FIGURES GIVEN IN THE ATTACK UPON THE SEVENTY-SIXTH FINDING.

Every witness who has testified in this case in relation to the flow of water in Kern River during the different years, agree that during the year 1878, there was an unusual large volume of water flowing in Kern River.

Tracy testifies that there was a fair head of water flowing in the river in 1879 (Vol. 2, fol. 1001), and he testifies that in 1878, there was as much water flowing in Kern River, as there was in 1872. (Vol. 2, fol. 1036.)

XLVIII.

THE SEVENTY-EIGHTH FINDING IS CONTRARY TO THE EVIDENCE, IN SO FAR AS IT FINDS THAT THE WATER OF KERN RIVER, AFTER ENTERING BUENA VISTA SLOUGH, ALL RUNS SOUTH AND INTO BUENA VISTA LAKE, UNTIL PREVENTED FROM DOING SO BY THE ARTIFICIAL OBSTRUCTIONS AT COLE'S BRIDGE.

See the testimony referred to in connection with our attack upon the eleventh finding, page 397, *ante*.

XLIX.

THE JUDGMENT MUST BE REVERSED IN THIS CASE, THE FINDINGS OF FACT BEING CONTRADICTORY.

FIRST. The first and second findings are contradictory inthis:

a. The second finding finds that the land described in the patents mentioned in Finding No. 1 were, until patented to plaintiff, the property of the State of California, and that the State of California was the owner thereof. That prior to the issuance of such patents the plaintiffs had no right, title, interest, claim, demand or possession, legal or equitable, of, in or to said land, or any part thereof.

Whereas, it appearing by Finding No. 1 that the State of California, for at least ten months prior to the issuance of said patents, held the naked legal title to such lands, the plaintiffs for such ten months being the owners of the entire beneficial interest in the land,

§ 3521, Polit. Code;
Bludworth v. *Lake*, 33 Cal., 256.

b. The second finding finds that the land described in the decree in the case of *People* v. *Conter*, were until the filing of the decree in that case (September 17, 1878), the property of the State of California, and that said State was the owner thereof; and that the plaintiffs had not, prior to the filing of such decree, any right, title, interest, claim, demand or possession, legal or equitable, of, in or to said lands or any portion thereof.

Whereas, it appears by the first finding that plaintiffs had equitable, if not legal, rights in such lands long prior to the date of the filing of such decree (September 17, 1878.)

Before the Court could have made a decision in that case awarding the lands to plaintiff, it had to find:

(1) That plaintiffs had filed an answer in the case, claiming the land as early as May 19, 1878,

(2) That the plaintiffs had title, legal or equitable, under a patent issued for the land by the State of California, dated November 11, 1867.

(3) That they had since November, 1867, made expenditures on the land for improvements, paid taxes, etc.

And all this must appear as of or prior to the date the answer is filed.

Act of March 20, 1878;
Stat. Cal., 1877–8, p. 358.

SECOND. The third, eighteenth and seventy-first findings are contradictory in this:

The third finding finds as a fact that the channel of Buena Vista Slough extends as far north as Section 24, T. 29 S., R. 23 E., and through two sections of land described in the amended complaint.

The seventy-first finding finds that such channel only extends to the body of swamp land.

THIRD. The seventy-first and seventy-second findings are contradictory in this:

The seventy-first finding finds as a fact, that the channel of Buena Vista Slough is well defined from Kern River north, to the swamp land.

Whereas, the seventy-second finding finds as a fact, that such channel does not extend to the body of swamp land.

FOURTH. The third, eighteenth and forty-sixth findings are contradictory in this: the third and eighteenth findings find as a fact, that the channel of Buena Vista Slough runs through plaintiffs' lands, whereas, the

forty-sixth finding finds as a fact, that no water channel runs through any of the lands of plaintiffs.

FIFTH. The fiftieth and sixty-second findings are contradictory, in this:

The fiftieth finding finds as a fact, that all the land delineated on Exhibit A, annexed to the findings, except the swamp lands and the 16th and 36th sections, is and always has been public land and belonging to the United States, whereas the sixty-second finding finds as a fact, that a large portion of such land is not public land, but is owned and in possession of private individuals, who are improving the same.

"Where findings are directly antagonistic, it cannot "be said that either finding is correct, or at least, "which is correct."

Manley v. *Howlett*, 55 Cal., 96;
Harris v. *Harris*, 59 Cal., 620;
Baker v. *Riordan*, XI P. C. L. J., 324.

The findings are open to the additional objection that they are unintelligible. In support of this criticism, we refer the Court to the fifth finding, with its numerous references to other findings.

L.

THE SO-CALLED CONCLUSIONS OF LAW, IN SO FAR AS THEY ARE CONCLUSIONS OF LAW, AND NOT ARGUMENT OR FINDINGS OF FACT, ARE NOT ANY OF THEM WARRANTED BY THE FINDINGS OF FACT, AND JUDGMENT SHOULD BE GIVEN FOR THE PLAINTIFFS ON THE FINDINGS AS SIGNED.

The third and eighteenth findings find as a fact, that the lands of paintiffs are situated on a natural watercourse, and the fifty-ninth finding finds as a fact, that the defendant is diverting large quantities of water from such watercourse.

LI.

THE DEFENDANT HAD NO RIGHT TO TAKE OR APPROPRIATE ANY WATER FROM KERN RIVER, TO THE INJURY OF PLAINTIFFS, WHO WERE RIPARIAN OWNERS ON SUCH RIVER.

The rights of plaintiffs as riparian owners, are recognized and established by the common law, recognized by the Act of the Legislature adopting such law, and are expressly saved by the very Act under which the defendant claims the right to divert the water of Kern River.

§ 1422, Civil Code.

Even had the defendant been a riparian owner on Kern River, it had no right to take water from the river and conduct it to and use it on other land; as between riparian owners, such an use is not a "reasonable use."

Union M. & M. Co. v. *Ferris*, 2 Sawy., 176;
do. v. *Dangberg*, 2 Sawy., 451;
Stein v. *Burdan*, 26 Ala., 146;
Burdan v. *Stein*, 27 Ala., 116;
City of Emporia v. *Soden*, 25 Kans., 588.

Even in Colorado it is held that a person can appropriate only water sufficient to irrigate land that he owns or controls.

Thomas v. *Guiraud*, 14 Reporter, 201.

LII.

THE PLAINTIFFS HAVE NOT BEEN GUILTY OF LACHES IN ASSERTING THEIR RIGHTS.

They acquired title to a part of their land in September, 1878, or after the irrigating season of that year.

This suit was commenced just as early the next season as they began to suffer from the appropriation of water by defendant.

For none of the land in the amended complaint described, had a patent been issued for five years. (See 2d Finding.)

No period of time less than five years, can estop plaintiffs from asserting their rights to the water of a watercourse that runs through their land, the water being part and parcel of the land.

The plaintiffs established a perfect legal right to the land, and such right can only be barred by the statutory period of five years.

Union M. & M. Co. v. *Ferris*, 2 Sawy., 176;
Burdan v. *Stein*, 27 Ala., 117;
Pugh v. *Wheeler*, 2 Dev. & Bat., 50;
Crandall v. *Woods*, 8 Cal., 136;
American Co. v. *Bradford*, 27 Cal., 360.

If plaintiffs had stood by and seen the defendant erect improvements on the river above them, diverting water, then they would not be estopped from and questioning such diversion.

Stockman v. *Riverside L. & I. Co.*, July 30, 1883;
Shamleffer v. *Peerless M. Co.*, 18 Kans., 33;
6 Wait's A. & D., 208.
Morrill v. *St. Anthony F. W. P. Co.*, 26 Minn., 222;
Burdan v. *Stein*, 27 Ala., 116;

In the last two cases, the plaintiffs were proceeding under authority of an Act of the Legislature.

"This effect of delay is subject to the important "limitation that it is properly confined to claims for "purely equitable remedies, to which the party has "no strict legal right. Where an injunction is asked "in support of a strict legal right, the party is en- "titled to it if his legal right is established. Mere "delay and acquiesence will not, therefore, defeat "the remedy, unless it has continued so long as to "defeat the right itself."

2 Pomeroy Eq. Jur., § 817.

The only limitation to this action is that prescribed by the statute of limitations for the recovery of real property, the water being part and parcel of plaintiff's land.

St. Helena W. Co. v. *Forbes*, 10 P. C. L. J., p. 533.

And the statute of limitations "is applicable alike to all causes of action—to a cause of action in equity as well as one at law."

Boyd v. *Blankman*, 29 Cal., 41;
Angell on Lim'ns, § 25;
Dugan v. *Getting*, 3 Gill (S. C.), 138.

LIII.

THE FACT THAT OTHER PARTIES, WITH OR WITHOUT THE CONSENT OF THE PLAINTIFFS' CONSTRUCTED WORKS, TO CONTROL THE WATERS OF KERN RIVER BEFORE OR AFTER IT REACHED PLAINTIFFS' LANDS, CANNOT JUSTIFY THE DEFENDANT IN TAKING THE WATER FROM KERN RIVER, NOR IS THE FACT THAT OTHERS TAKE WATER FROM KERN RIVER ANY DEFENCE TO THIS ACTION.

See cases cited on pp. 20 and 21, *ante;*
Hill v. *Smith*, 32 Cal., 166.

LIV.

THE ACT OF CONGRESS OF JULY 26, 1866, AMENDED IN 1870, IN NO MANNER AFFECTS THE RIGHTS OF PLAINTIFFS, NOR DOES IT AID THE DEFENDANT. LONG BEFORE THE ACT WAS PASSED, THE LANDS DESCRIBED IN THE AMENDED COMPLAINT HAD PASSED FROM THE UNITED STATES, AND THE TITLE HAD VESTED IN THE STATE OF CALIFORNIA.

(2d and 79th findings);
Union M. & M. Co. v. *Ferries*, 2 Sawy., 185;
Union M. & M. Co. v. *Dangberg*, 2 Sawy., 455;
Leavenworth R. R. Co. v. *U. S.*, 92 U. S., 745;
Witherspoon v. *Duncan*, 4 Wall., 218;
Railroad Co. v. *Smith*, 9 Wall., 95;
Railroad Co. v. *Fremont* 9 Wall., 89;
Kernan v. *Griffith*, 27 Cal., 87.

The lands described in the amended complaint were no longer "public lands," and the Act of Congress of 1866 only applied to "public lands."

Newhall v. *Sanger*, 92 U. S., 761.

The Act is expressly limited in its operation to "public lands." The title of the Act is, "An Act granting the right of way to ditch and canal owners over the public lands."

Act Congress, 1866, Ch. 262; Vol. 14, U. S. Stat. at Large, p. 251.

This Court has decided that the Act of Congress of 1866 has no application to land, the legal title to which was in the United States, but held by the Government in trust for private parties.

Blanchard v. *Bracken*, January term, 1878.

And see—

Farley v. *Spring V. M. & I. Co.*, 58 Cal., 142.

The Superior Court, in deciding this case, held that the common law rule governing riparian rights was "obsolete" in this State.

We think this Court has often decided to the contrary.

All the cases referred to by counsel for defendant in the Superior Court, in which the Superior Court recognized the right of appropriation, were cases between appropriators. As between appropriators, we admit that the first in time has the better right, but as between an appropriator and a riparian owner, the appropriator has no rights, unless he has taken and used the water for a period of five years.

The rights of riparian owners, as established by the Common Law, prevail in every State in the Union, except it be the State of Colorado, and in that State, it is owing to the peculiar provisions of the Constitution and Statutes, that the Courts decide in favor of the right of appropriation, when such rights conflict with the rights of riparian owners.

Messrs. McAllister & Bergin, plaintiffs' counsel in this case, will file points and authorities, or a brief, in this case, and to them we leave, for presentation and argument, the general question of the rights of riparian owners.

Respectfully submitted.

STETSON & HOUGHTON,

Attorneys for Appellant.

San Francisco, August 28, 1883.

Service accepted by copy, this 31st
day of August A. D. 1883.

Louis T. Haggin

Att'y for Appellant.

Atty for Respondent